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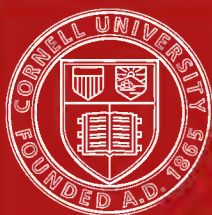
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A Text-Book

OF

Constitutional Law.

Act of March 3, 1875.

BY

EDWIN G. DAVIS,

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U. S. Army,

WEST POINT, N. Y.



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PREFACE.

THIS TEXT-BOOK OF CONSTITUTIONAL LAW is offered to those high schools and colleges whose aim is to give their students, first, a thorough knowledge of what the Constitution is, how it originated, and the subjects with which it deals; second, a sufficient, practical knowledge of the questions that have arisen under it, how they have been decided, and the general principles of constitutional law. Experience as an instructor has led the writer to the conclusion that the method of presentation here adopted is the best possible to secure these results. Written in such simple and readable language as to be easily understood, it is believed that this book will meet the wants of all institutions except those whose course is so extended as to require a treatise, and that it will be found useful to those members of the bar who desire a work whose simplicity of arrangement and reference will enable them to refer at once to the leading cases that have arisen under the Constitution and laws of the United States.

Attention is invited to the treatment of the following subjects: the taxing power, the power to regulate commerce, the money and war powers of Congress, laws impairing the obligation of contracts, the Federal judicial system, the status of the Territories belonging to the United States, and the proper relation of the State and Federal Governments—subjects which the student seldom understands, owing to the brief and imperfect consideration given them in what are usually called manuals of the Constitution.

The list of questions given in an Appendix will serve to test the students' knowledge of the subject. They are intended to be used by him for purposes of review and self-examination. This feature will make the work of special value to those who

are studying constitutional law without the assistance of an instructor, or who are preparing for an examination.

The total lack of a suitable text-book for such a course as the author aims to afford has led to the preparation of this volume.

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United States Military Academy.

WEST POINT, N. Y., May, 1905.

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CONSTITUTION OF THE UNITED STATES OF AMERICA.

WE, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION 1.—1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2.—1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first

meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and, until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

SECTION 3.—1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year; and of the third class, at the expiration of the sixth year; so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION 4.—1. The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5.—1. Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and, from time to time, publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

ART. II. SECTION 6.—1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to, and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during such time; and no person, holding any office under the United States, shall be a member of either House during his continuance in office.

SECTION 7.—1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

2. Every bill, which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to

that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and, if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law.

8. Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8.—The Congress shall have power

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States:

2. To borrow money on the credit of the United States:

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes:

4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States:

5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures:

6. To provide for the punishment of counterfeiting the securities and current coin of the United States:

7. To establish post-offices and post-roads:

8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries:

9. To constitute tribunals inferior to the Supreme Court:

10. To define and punish piracies and felonies, committed on the high seas, and offenses against the law of nations:

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

12. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years:

13. To provide and maintain a Navy:

14. To make rules for the government and regulation of the land and naval forces:

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions:

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress:

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places, purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings: And

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION 9.—1. The migration or importation of such persons as any of the States, now existing, shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

3. No bill of attainder, or *ex post facto* law, shall be passed.

4. No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

5. No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties, in another.

6. No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10.—1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and

silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION 1.—1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

3. The electors shall meet in their respective States, and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate. The President

of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.

4. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

5. No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as Presi-

dent, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

7. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive, within that period, any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation:

9. "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SECTION 2.—1. The President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3.—1. He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4.—1. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1.—1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION 2.—1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens

of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

2. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3.—1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1.—1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2.—1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another

State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3.—1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4.—1. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

1. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratifica-

tion may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight, shall, in any manner, affect the first and fourth clauses in the ninth section of the first Article; and that no State; without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

1. All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

1. The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

AMENDMENTS TO THE CONSTITUTION.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II.

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or

in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII.

1. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign, and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such a majority, then, from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the

States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.

2. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators; a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

SECTION 1.—Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2.—Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

SECTION 1.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2.—Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3.—No person shall be a senator or representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

SECTION 4.—The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave;

but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5.—The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

SECTION 1.—The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2.—The Congress shall have power to enforce this article by appropriate legislation.

CHAPTER I.

THE FORMATION OF THE AMERICAN UNION.

The Colonies.—The thirteen States which, by their union in 1789, formed the Government of the United States were originally settled as colonies of Great Britain. These colonies were of three kinds—provincial or royal, proprietary, and charter; and, at the time of the Revolution, New Hampshire, New York, New Jersey, Virginia, North Carolina, South Carolina, and Georgia were of the first class; Maryland, Pennsylvania, and Delaware of the second; and Massachusetts, Rhode Island, and Connecticut of the third. The people exercised a somewhat indefinite power to make their own laws, this power being very general in the charter Colonies, but much more restricted in the others.

At first the Colonies had little or nothing in common, but it was soon found that at least some sort of union was necessary for their own protection. Various attempts to establish closer relations were made, and, in 1754, a plan was formulated looking to the union of all the Colonies under a general government, the chief executive of which, a president-general, to be appointed by the Crown. This plan failed, but the Colonies were forced by circumstances into more or less united action in the wars and Indian troubles that preceded the Revolution.

These attempts at union had, however, no element of opposition to the British Government, and it was not until a "long train of abuses and usurpations" had finally aroused the colonists to the necessity of resisting the encroachments of Parliament upon what they regarded as their rights and liberties that steps were taken toward that union which, departing from its avowed purpose—that of securing the rights of the colonists as Eng-

lishmen—declared the independence of the Colonies, and laid the basis of their subsequent greatness and prosperity.

Ideas of Liberty.—Believing themselves entitled to all the rights and privileges of Englishmen, as set forth in the principles of the common law and in the four great historical documents, the Magna Charta, the Petition of Right, the Habeas Corpus Act, and the Bill of Rights,¹ and seeing in the legislation of Parliament for the Colonies a distinct tendency toward oppression, they held themselves justified in resisting the enforcement of unjust laws and in petitioning the King and Parliament for relief.

The Congress of 1765.—In March, 1765, Parliament passed an act, the purpose of which was to derive a revenue from the sale of stamped paper in the Colonies. It met with sturdy opposition, and, in October of that year, nine of the Colonies sent delegates to a congress which assembled in New York to make a representation of grievances and to implore relief. This was the first general meeting of the Colonies for this purpose; and in the declaration of rights which the delegates drew up great emphasis was laid on the principle for which they were contending, "that it is inseparably essential to the freedom of a people, and the undoubted right of Englishmen, that no taxes be imposed but with their own consent, given personally or by their representatives."

The resistance of the people having rendered the Stamp Act abortive, it was repealed the year after its enactment; Parliament, however, taking the occasion to assert its unqualified right to legislate for the Colonies on all subjects whatever. This claim assumed practical form the following year, when an attempt was made to collect a tax on tea imported for consumption in the Colonies. This measure was as unpopular as the Stamp Act, and

1. This embodied in statutory form the principles enumerated in the "Declaration of Right," presented by the Parliament to the sovereigns called by that body to the throne in 1688. 1 Wm. & Mary, ch. 2 (1689).

was as strenuously opposed. Attempts at coercion on the part of Parliament led to open resistance by the Colonists and finally to war.

The First Continental Congress.—In September, 1774, at the suggestion of Massachusetts, a congress, composed of delegates from all the States except Georgia, met at Philadelphia to deliberate upon the state of public affairs. In their deliberations each Colony was to have one vote. This rule of equal suffrage, then established, continued in force until the adoption of the Constitution. Clearly defining their rights and the foundation of them, they set forth several instances of their violation, their complaints being directed principally to four points: first, taxation without representation; second, keeping standing armies, in time of peace to overawe the people; third, denying a right to trial by a jury of the vicinage; fourth, unreasonable searches on general warrants. To secure a redress of their grievances, they adopted a non-importation, non-consumption, and non-exportation agreement. They prepared an address to the people of Great Britain, a memorial to the inhabitants of British America, and a petition to the King. In case a redress of grievances should not be granted, it was recommended that a second congress be held in the following May.

The Second Continental Congress.—The breach between Great Britain and the Colonies becoming wider, the second Congress convened at Philadelphia in May, 1775. During the summer Georgia joined with the other Colonies and sent delegates. War now began, and the Continental Congress became the governing body, continuing in session until 1781. The powers that it exercised were wholly revolutionary in character, being derived from the acquiescence of the people and the States, and consisting of certain undefined powers of general concern, such as the power to declare and conduct war, conclude peace, form alliances, and contract debt on the credit of the Union.

But this merely revolutionary government was soon found to be unsatisfactory. The powers it exercised never having been formally conferred or agreed upon by the States, it was customary to regard Congress as a mere advisory body, and not as a government. In important matters its recommendations were often disregarded, the States showing a selfish tendency to refuse obedience whenever they believed that the measures proposed by Congress were not favorable to their own interests. There was, of course, no power in Congress to enforce obedience to its measures; dissolution and ruin were threatened, and an attempt was made to meet and remedy this evil by

Articles of Confederation and Perpetual Union.—The Declaration of Independence had been signed on July 4, 1776, and a few days later a committee, previously appointed to draft Articles of Confederation, submitted to Congress the result of its labors. These Articles were amended from time to time, and finally agreed to in November, 1777, when they were submitted to the States for ratification. All the States except two ratified in 1778; Delaware delayed until the next year, and Maryland until 1781. The Articles were not to be binding until they had been ratified by all the States. As soon, therefore, as this ratification was secured, the Continental Congress with mere revolutionary and undefined powers came to an end, and Congress under the authority of the Articles of Confederation at once convened.

The Articles declared that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled." Congress, under the Confederation, was composed of a single house. The delegates were to be chosen in each State as the legislature thereof should direct, and each State was to be represented by not less than two nor more than seven. There was no executive and no judiciary, but Congress was to settle disputes between

the States. Although Congress was given power to declare war and conclude peace, to send and receive ambassadors, and to exercise many other attributes of sovereignty, it was further provided as a limitation that "the United States in Congress assembled shall never engage in war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a Commander-in-chief of the Army or Navy, unless nine States assent to the same."

Defects in the Articles.—"The defects in the Confederation were such as rendered speedy failure inevitable. It accomplished a temporary purpose in a very imperfect manner, but it was impossible that it should do more. The Confederation was given authority to make laws on some subjects, but it had no power to compel obedience; it might enter into treaties and alliances, which the States and the people could disregard with impunity; it might apportion pecuniary and military obligations among the States in strict accordance with the provisions of the Articles, but the recognition of the obligations must depend upon the voluntary action of thirteen States, all more or less jealous of each other, and all likely to recognize the pressure of home debts and home burdens sooner than the obligations of the broader patriotism involved in fidelity to the Union; it might contract debts, but it could not provide the means for satisfying them; in short, it had no power to levy taxes or to regulate trade and commerce, or to compel uniformity in the regulations of the States; the judgments rendered in pursuance of its limited judicial authority were not respected by the States; it had no courts to take notice of infractions of its authority, and it

had no executive. A further specification of defects is needless, for any one of those mentioned would have been fatal. 'Obedience is what makes government, and not the names by which it is called'; and the Confederation had neither obedience at home nor credit or respect abroad. The people were one in promising and thirteen when performance was due, and it became at last difficult to enlist sufficient interest in its proceedings to keep up the forms of government through the meetings of Congress and of the Executive Committee."²

Events Leading to the Convention Which Framed the Constitution.—In January, 1786, the Legislature of Virginia adopted a resolution and appointed commissioners to meet such as might be appointed by the other States, "to take into consideration the trade of the United States, to examine the relative situation and trade of the said States, and to consider how far a uniform system in their commercial relations may be necessary to their common interest and their permanent harmony." New York, Pennsylvania, New Jersey, and Delaware responded to this call, and their delegates met those appointed by Virginia at Annapolis in September, 1786. Finding their numbers too small and deeming their powers too limited, they did not consider the question that had brought them together, but separated after making a report to Congress and to the several States, in which they recommended that the States should appoint commissioners "to meet at Philadelphia on the second Monday of May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union, and to report such an act for that purpose to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every State, will effectually provide for the same."

2. Cooley, Prin. Const. Law, p. 14.

This report was favorably received by Congress, and in February, 1787, a resolution was adopted, in which it was recommended that "a convention of delegates, who shall have been appointed by the several States, to be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of the Government and the preservation of the Union."

The Constitutional Convention.—The Convention met in Philadelphia in May, 1787, all the States being represented by delegates except Rhode Island, which refused to participate. The delegates were not long in determining that the defects in the Federal Constitution could not be cured by amendment, and that an entirely new instrument was necessary. Without other authority than to amend the Articles of Confederation, they proceeded to construct a new frame of government. Their actions were clearly extra-legal or revolutionary, but they did not assume that their recommendations were to be binding, or that the new Constitution which they proposed had any authority other than that to be given to it by ratification and adoption by the people of the United States. Acting practically as so many volunteers, they framed an instrument of government which discarded the theory of State sovereignty on which the Articles of Confederation had been based, and because of which they failed. This new Constitution created a government of limited and delegated powers, but one which derived its powers directly from the people of the United States, and not from mere grants by the separate States. The United States had been, in theory at least, a sovereign State since the adoption of the Declaration of Independence, but with the ratification of the Constitution it became completely so in fact, and subject thereafter to

no will but that of the power that had called it into being—the people.

This plan of government was adopted only after long debates and many mutual concessions by the various elements that made up the Convention. It was finally agreed to on September 17, 1787, and submitted to the Congress of the Confederation with the recommendation that it be referred to a convention of delegates, chosen in each State under its legislature, for their assent and ratification. This suggestion was followed, and the Constitution thus went before the whole people for their acceptance or rejection. It matters not that they voted upon it by delegates in convention assembled. This method was in accordance with the ideas of popular government as they existed at that time, and the ratification secured was as much a ratification by the whole people as would have been obtained had the submission to them been direct, which would, no doubt, be the case if a similar question were to be decided to-day.

The Government under the Constitution.—It was provided in the Constitution that “the ratification of the conventions of nine States shall be sufficient for the establishing of this Constitution between the States so ratifying the same.” By September, 1788, eleven States had notified Congress of their ratification, and accordingly, on the 13th of that month, Congress, by a resolution, appointed the first Wednesday in January, 1789, for the choice of electors of President, the first Wednesday in February for the assembling of the electors to vote for President, and the first Wednesday in March for the Government under the Constitution to go into operation. A delay was, however, experienced. A quorum of the House of Representatives was not secured until the first of April, of the Senate until the 6th, and the President was not inaugurated until the 30th.

North Carolina and Rhode Island, the last two States to ratify the Constitution, finally gave their assent, the former in November, 1789, and the latter in May, 1790, and the final and lasting union of the original thirteen Colonies under one sovereign Government was complete.

CHAPTER II.

DEFINITIONS AND GENERAL PRINCIPLES.

State and Nation.—A state has been defined to be a body politic or society of persons united together under common laws for the purpose of promoting their mutual safety and advantage by the joint effort of their combined strength. The terms “state” and “nation” are often given as synonymous, but they are not strictly so. The term “nation” is more nearly synonymous with “people.” A state may comprise several nations or peoples, and a single nation may be so divided politically as to constitute several states.¹

People and Nation.—Neither are the terms “people” and “nation” strictly synonymous. “The people constitute the nation, but when we speak of the people, we use the term to designate those who live within the territory of the nation and who belong to it by such residence and by race and community of customs and characteristics; without implying the idea of government. The word ‘nation’ adds to this conception the idea that the people are organized into a jural society and occupy a position among the independent powers of the earth.”²

Sovereign and Dependent States.—A state is either sovereign or dependent. It is sovereign when it possesses within itself the absolute, unlimited power of governing without control by or responsibility to any political superior, and it is dependent when the ultimate governing power exists in some other state

1. In this work when the word *state* is used in the general sense, indicated above, it is written “state”; when used to designate one of the separate commonwealths of the American Union, it is written “State.”

2. Black, Const. Law, p. 17.

or ruler to whom it owes allegiance.³ The United States is completely sovereign; the separate States are not, although, under our peculiar system, they are allowed to exercise many of the powers that are among those necessarily belonging to sovereign states.

Constitutions. Things Pertaining Thereto.—The constitution of a state is its fundamental or organic law. It prescribes the form of government, regulates the division of sovereign powers, designates the persons to whom they are to be confided, and fixes the extent and manner of their exercise.

In the United States, in addition to the Federal Constitution, which is the supreme law of the land, each State has its own constitution, which is its supreme local law.

Constitutions are written or unwritten. As to the origin of constitutions, it may be said that a written constitution is a product or creation, being granted by the sovereign ruler or ordained and established by the people at one and the same time; while an unwritten constitution is a growth, being gradually developed, and contributed to not only by the executive and legislative branches of the government, but also by the courts, and by the recognition, by rulers and people, of usages and theories gradually acquiring the force of law.⁴ Written constitutions are very generally produced by a people following the successful exercise by them of the right of revolution, which may be said to exist when the government has become so oppressive that its evils decidedly overbalance those which are likely to attend a change, when success in the attempt is reasonably certain, and when such institutions are likely to result as will be satisfactory to the people.⁵

The chief advantage of a written over an unwritten constitution lies in the fact that it is not, as is the latter, subject to per-

3. Smith, *El. Law*, p. 15.

4. Black, *Const. Law*, p. 6.

5. Woolsey, *Pol. Science*, i. 402.

petual change at the hands of the law-making power. A written constitution is the absolute rule of action and decision as to all points covered by it, and must control until changed by the authority that established it; but an unwritten constitution, having no security against change, except in the conservatism of the law-making body, the political responsibility of its members to the people, or in the fear of forcible resistance, may be departed from at the will of the legislature.

When a law is opposed to the rules or principles of the constitution of a state, it is said to be unconstitutional. In the United States such an enactment is void; in Great Britain it is not, and operates to amend or modify the constitution.

Constitutional law has to do with the nature of constitutions, their establishment, construction, and interpretation; and with the validity of legal enactments, as tested by the criterion of conformity to the fundamental law.

Construction of Constitutions.—The constitution of a state, being a legal instrument, must have its true meaning and purpose determined by an application of the rules of interpretation, subject, however, to the consideration that constitutions are for the benefit of the people, and must be so liberally construed as to carry out the great principles of government, not to defeat them.

Schools of Interpretation.—From the time of the adoption of the Constitution there have existed two schools of interpretation in the United States. One bases its arguments on the theory that the powers of the Federal Government were granted by the sovereign States to it as their agent, for common purposes, but with limited powers; the other upon the theory that these powers were granted by the *whole* people, and that the Federal Government is the only sovereign power that ever existed within the limits of the United States. "According to one school, the Federal Constitution is to be subjected to a strict construction in respect to the powers granted to the National Government and a

liberal interpretation for the preservation of the autonomy of the States. According to the other school, the rule of interpretation is to be reversed. Those holding the one opinion contend that the government of the Union should be held strictly to the exercise of the powers expressly granted to it, and that its province and jurisdiction should not be enlarged by implication. According to the other party, the true theory of our government and institutions is in favor of such a construction of the Constitution as will give the Federal Government the largest measure of power which is compatible with the continued and useful existence of the States. By them the nation is regarded as the only sovereign power, and they contend that it should be accorded all such rights and powers as may be convenient to enable it to discharge its functions as such and to maintain its place among the nations of the earth. The extreme advocates of the one view have maintained that it was within the rightful power of a State to nullify (that is, refuse submission to, and resist by any adequate force) any act of the general Government which, in the judgment of that State, was contrary to the Constitution or beyond the boundaries of the legitimate power of the Union. These theorists also contended that a State possessed the power and the right to withdraw from the Union and set up a new government, either alone or with other States which might follow its example, whenever, in its judgment, its own interests required such a dissolution of the tie which bound it to the other States. On the other hand, statesmen of the other party have gone so far as to regard the several States as mere emanations from the Union, and as standing in the same relation to it which is occupied by the municipal corporations of a State toward the State. Between these two extremes lies the truth. Although the two theories of construction, strict and liberal, still subsist, it is now quite generally agreed that both the several States and the Union are supreme, each within its own appropriate sphere; that the rights of the individual State and of the

Union are equally necessary to be preserved and must be accommodated to each other; that the authorities of the Union are to judge of the powers granted to it; that the rightful autonomy of each State is beyond the reach of Federal interference; and that the Union is perpetual and indissoluble.”⁶

Rule for Determining the Validity of State and Federal Powers.—To ascertain whether a particular power may be exercised by the United States, the Constitution must be examined in order to see whether, expressly or by fair implication, the power has been granted. If the grant does not appear, the conclusion must be that the exercise of the power is unwarranted. To ascertain whether a State may exercise a particular power, the Constitution of the United States and that of the particular State must be examined. If the exercise of power be not prohibited to the State in either instrument, the inference is that the power may be exercised. To ascertain fully, however, we must also examine the Constitution of the United States to see if the power, while not prohibited to the States, is yet among those granted to the Federal Government in exclusive terms, or those which, though merely granted, are yet of such a character that their exercise by both State and Federal Governments at the same time would be conflicting and inconsistent.

Restrictions in the Constitution on the Exercise of Power.—The restrictions and limitations which are contained in the Federal Constitution operate, unless the States are expressly mentioned, to restrict the power and the authority of the Federal Government only; for example, the immunities guaranteed in the trial of persons accused of crime, and the guarantees of a jury trial in civil and criminal cases, constitute restrictions on the Federal Government alone, and do not affect trials in the State courts. It will be found, however, that some

6. Black, Const. Law, p. 25.

of the prohibitions against the Federal Government are also specially made to apply to the States, such as the prohibition in regard to *ex post facto* laws and bills of attainder.

CHAPTER III.

THE PREAMBLE.

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

The Constitution opens with an announcement of the authority that enacts it, its purpose, and the nation for which it was established. It purports to come from the ultimate source of sovereign authority, the people of the United States, and to be established for the nation, named in the Articles of Confederation "The United States of America."

We have here a complete answer to those statesmen who have contended for State as opposed to national supremacy in our theory of government—an answer that the fiercest assaults of partisanship have never been able to shake. It cannot be denied that during the unhappy period of the Confederation the States had usurped and exercised many of the rightful attributes of sovereignty, and that, in their bitter jealousies and destructive rivalries, they had forced the idea of national unity well into the background; but it is also indisputable that, in adopting the Constitution, the people arose, re-asserted the original idea, repudiated the claims of State supremacy, and perpetuated the true theory of the Union in an organic law, subject to no change or modification whatever, except at the hands of the sovereign power that established it.

The Preamble announces that the Union, already declared in the Articles of Confederation to be perpetual, was by the Constitution to be made more perfect. What can give a better idea of national unity and indissolubility than a perpetual Union made more perfect?¹

1. *Texas v. White*, 7 Wall, 700.

CHAPTER IV.

THE LEGISLATURE.—ARTICLE I. OF THE CONSTITUTION.

Section 1.—All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Why Two Branches.—Experience and reason alike show that a legislative department consisting of two houses is best adapted to safeguard the interests and welfare of the people, and in most modern States in which representative institutions are established such a legislature is provided for in their constitutions. It will be remembered that the Congress of the Confederation consisted of but a single house, and that its members conceived themselves to be rather the representatives of their States as sovereign entities than of the people of the United States resident therein. The framers of the Constitution saw clearly the necessity of abandoning this one-house legislature, and it is perhaps fortunate that in constructing their new plan they had before them a good working model for a representative government in the British constitution, from which they evidently copied.

Basis of Representation.—They were careful to provide that the basis of representation in the two houses should be different. The Senate represents the people in their local commonwealths, the States, by whose legislatures the senators are chosen; while the House represents the people grouped in small and single communities, its members being directly chosen by them. Here was provided what experience has shown to be the essential element of success in a bicameral legislature. If

the two houses are to constitute an efficient check upon each other, it seems necessary that the basis of representation should be separate and distinct in each.

Popular and Conservative.—The House is the popular branch. Its members are frequently elected, are fresh from contact with their small constituencies, and so are apt to reflect in their legislative will the momentary passions and errors of the people. The Senate is the conservative branch. Its members are elected for longer terms; they are divided into classes so that at least two-thirds will always have had two years' experience or more in office; they are chosen by the State legislatures, and are, therefore, somewhat removed from the effect of sudden changes in the popular will. The House may be relied upon for speed and energy, the Senate for steadiness and reflection.

Section 2. Clause 1.—The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

Frequency of Election.—In fixing the length of time for which representatives are elected, there were three considerations of importance: the term must not be so long as to destroy the representative's sense of dependence on and responsibility to his constituents; it must not be so short as to prevent his acquiring that practical knowledge of the methods of legislation and acquaintance with the needs and interests of the country which would make him of value as a legislator; and, finally, the people were attached to the principle of frequent elections, and would have rejected, perhaps, any plan that contemplated the election of representatives for a long term of years. The term of two years was selected as best meeting all these requirements.

Qualifications of Electors Fixed by States.—It is to be noticed that this clause of the Constitution does not give the

United States the power to determine who may vote for representatives, but simply adopts the qualifications which each State may prescribe for its own electors. The States have been in no wise uniform in prescribing these, and as a result there is a notable lack of uniformity in the qualifications of those persons who elect the Federal House of Representatives, and indirectly the Senate and President. In some States there is a property qualification; in others, an educational one; in some, women are allowed to vote; and in others, unnaturalized foreigners, after a certain period of residence, are granted the privileges of the ballot.

It has been argued that this clause which allows the States to fix the qualification of electors of members of the Federal Legislature is a defect in our organic law which needs amendment, and that it resulted from an unfortunate and unnecessary concession to the theory of State sovereignty and independence.¹ However this may be, it is certain that the States may extend the privilege of the suffrage to the widest limits or make any restrictions not inconsistent with a republican form of government and not in conflict with the Fifteenth Amendment to the Constitution, which prevents the States from depriving any person of the right to vote on account of race, color, or previous condition of servitude.

Clause 2.—No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Qualifications for a Representative.—The qualifications here prescribed relate to age, citizenship, and inhabitance.

The representative must have attained the age of twenty-five years.

1. Pomeroy, Const. Law, Sec. 211.

He must have been seven years a citizen of the United States. A foreigner who becomes naturalized is eligible to election as a representative after a citizenship of seven years. But to become naturalized requires a previous residence of five years. It will be seen, therefore, that before a foreigner can become a representative he must have had at least twelve years' residence in the United States.

He must, when elected, be an inhabitant of the State in which he shall be chosen—that is, he must be a domiciled resident of such State. By a political fiction, however, a representative of his country at a foreign court, though residing abroad, is yet regarded as being within the jurisdiction of his own government. He remains subject to its laws, and is not subject to the laws of the country in which he resides. His foreign residence does not, therefore, operate to deprive him of his character as an inhabitant of the State of which he is a citizen, and he may, while still residing abroad, be elected to a seat in Congress; so, also, may he be elected if he is merely traveling or temporarily sojourning abroad.

In addition to the qualifications above noted, the Fourteenth Amendment, which was declared a part of the Constitution on the 28th of July, 1868, provides that “no person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.” Congress has from time to time removed the disability created by this amendment, in

individual cases, and by the Act of June 6, 1898, the removal was made general.

The Constitution having fixed the qualifications for a representative, the States cannot add to, vary, or qualify these in any manner whatever. They cannot, for example, require their representatives to be freeholders or professors of any particular religious belief, or inhabitants of the districts from which they are chosen, in addition to being inhabitants of the State; but it is to be noticed that the power in the States to fix the qualifications of electors of representatives may operate to prevent a citizen from voting for representative when he is himself eligible to election as such.

Clause 3.—Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and, until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Apportionment of Representatives.—In determining the composition of the two Houses of Congress the principle of

local government was preserved so far as to give each State an equal representation in the Senate, but the idea of a centralized government triumphed in constructing the lower House. There was some discussion as to whether the number of representatives should be based upon property or population. It was soon seen, however, that a rule must be established which would hold good for all time, and by which the representation could be equably adjusted and re-arranged whenever necessity should require; also that representation according to population was the only rule that could possibly meet these requirements. It was therefore adopted, and it was decided that the number of representatives should never exceed one for every thirty thousand, but that each State should always have at least one; and that as a basis for subsequent apportionments an enumeration of inhabitants should be taken within three years after the first meeting of Congress and at intervals of ten years thereafter.

Respective Numbers; How Determined.—But here a difficulty arose that could be met only by a compromise. Most of the States contained a mixed population of freemen and slaves, and in the Southern States the latter class bore a large proportion to the former. On one side it was contended that slaves were property, and therefore not to be included in the aggregate of population; on the other, that they were actual persons, and were as much entitled to be represented as women and minors and others denied the exercise of political rights. As a compromise, it was decided that to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, should be added three-fifths of all other persons—meaning slaves.

It is proper here to refer to that part of the Fourteenth Amendment to the Constitution which, after slavery had been abolished, was inserted to prescribe a new rule for determining the respective numbers of the States: "Representatives shall be apportioned among the several States according to their re-

spective numbers, counting the whole number of persons in each State, excluding Indians not taxed." The difference between the new rule and the old is obvious, and comment is unnecessary.

Mode of Apportionment.—The first enumeration was made in 1790, and there has been one every tenth year since.

Although apparently easy, it was found difficult in actual practice to apportion representatives among the States according to their respective numbers. The first question that arose was as to whether, in order to determine the whole number of representatives, the population of the United States should be divided by the number selected as the basis of representation, or whether the population of each State should be divided by that number and the sum of the quotients taken. The latter method was adopted and followed until 1842, when it was slightly changed by allowing an additional representative to those States whose remainders were greater than one-half the common divisor.

After the census of 1850 a new method of apportionment was adopted, and it has since prevailed. The total number of representatives is first decided upon; the total population is then divided by this number, and the quotient taken as the basis of representation. The population of each State is divided by this common divisor, and, if the aggregate of the quotients thus obtained does not equal the number of representatives agreed upon, an additional representative is given, in order, to the States having the largest remainders until the required number is attained.

The number of representatives for the decade following the first census was 105 and the basis of representation 33,000. The twelfth census was taken in 1900, and an act of Congress (January 16, 1901) fixes the present number of representatives at 386; the basis of representation is 193,167.

In addition to the representation of the States, Congress allows each organized Territory, including Hawaii, to send a

delegate to the House of Representatives. Such delegates have the privilege of addressing the House, but not of voting. They are also, by a rule of the House, entitled to membership on certain committees which have charge of matters in which the Territories, as such, are directly interested.

Clause 4.—When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

Vacancies; How Filled.—Vacancies may be created by death, resignation, expulsion, or accepting incompatible offices. Since the governors of the several States are, by the Constitution, required to provide for filling vacancies, it is proper that, when a vacancy occurs in the representation of a State, the governor should be formally notified of its existence; when so notified, it becomes his duty to order an election in the district in which the vacancy exists, which vacancy is filled by the choice of a representative to serve out the unexpired term of the former incumbent. His right to order an election does not, however, depend on the receipt of notice from the House that a vacancy exists. It is sufficient if he has received the resignation of a member.

Clause 5.—The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

Officers of the House.—The Speaker is the presiding officer of the House. The “other officers” referred to; such as, clerk, sergeant-at-arms, etc., are not members of the House. The position of Speaker is one of the most important and powerful in our Government.

Impeachment.—The Constitution gives the House the sole power of impeachment. The method of proceeding, as far as the House is concerned, is as follows: A committee of the House is first appointed to investigate the conduct of the officer

who is supposed to be guilty of acts requiring impeachment. If it reports in favor of impeachment, the question is then acted on by the House. If the House adopts the recommendation of the committee, articles of impeachment are prepared, embodying the charges on which the offending officer is to be tried. A committee is then appointed to prosecute the impeachment before the Senate. This subject will be further treated under the power of the Senate to try impeachments. (See page 60.)

Section 3, Clause 1.—The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.

The Senate. Equality of Representation.—As heretofore remarked, prior to the adoption of the Constitution a practical equality had existed among the States, and on all questions before Congress each State had been allowed one vote. In the Constitutional Convention it developed that the smaller States wished this same rule to hold under the Constitution, whereas the larger States contended that an equality of representation in either House would be unjust. As a matter of compromise and recognition of the principles of State equality and local self-government, it was finally decided, notwithstanding differences in size, importance, and population, that each State should have the same number of senators, and that each senator should have one vote, but that the House should represent the States according to their population, thus recognizing the principle of nationality.

Mode of Election.—The Constitution provides that senators are to be chosen by the State legislatures for terms of six years, but it does not prescribe the manner of their election. Until 1866 each State legislature was allowed to elect senators for that State according to its own rule of procedure, and there was, in consequence, much irregularity in method. But in that

year Congress, in pursuance of its power to regulate the time and manner of holding such elections,² by law prescribed the following uniform rule: The legislature of each State which shall be chosen next preceding the expiration of the time for which any senator was elected to represent said State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a senator in Congress in the place of such senator so going out of office, in the following manner: Each House shall openly, by a *viva-voce* vote of each member present, name one person for senator in Congress from said State, and the name of the person so voted for who shall have a majority of the whole number of votes cast in each House shall be entered on the journal of each House by the clerk or secretary thereof; but if either House shall fail to give such majority to any person on said day, that fact shall be entered on the journal. At 12 o'clock, meridian, of the day following that on which proceedings are required to take place, as aforesaid, the members of the two Houses shall convene in joint assembly, and the journal of each House shall then be read, and if the same person shall have received a majority of all the votes in each House, such person shall be duly declared elected senator to represent said State in the Congress of the United States; but if the same person shall not have received a majority of the votes in each House, or if either House shall have failed to take proceedings as required by this act, the joint assembly shall then proceed to choose, by a *viva-voce* vote of each member present, a person for the purpose aforesaid; and the person having a majority of all the votes of the said joint assembly, a majority of all the members of both Houses being present and voting, shall be declared duly elected; and in case no person shall receive such majority on the first day, the joint assembly shall meet at 12 o'clock, meridian, of each succeeding day during the session of

2. Constitution, Art. I., Sec. 4, cl. 1.

the legislature, and take at least one vote, until a senator shall be elected.

Elections to Fill Vacancies.—Whenever, on the meeting of the legislature of any State, a vacancy shall exist in the representation of such State in the Senate of the United States, said legislature shall proceed, on the second Tuesday after the commencement and organization of its session, to elect a person to fill such vacancy, in the manner hereinbefore provided for the election of a senator for a full term; and if a vacancy shall happen during the session of the legislature, then on the second Tuesday after the legislature shall have been organized, and shall have notice of such vacancy.

Certificates of Election.—It shall be the duty of the governor of the State from which any senator shall have been chosen as aforesaid to certify his election, under the seal of the State, to the President of the Senate, which certificate shall be countersigned by the Secretary of State of the State.

Clause 2.—Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year; and of the third class, at the expiration of the sixth year; so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

Division into Classes.—It will be recalled that March 4, 1789, was the day selected for the Government under the Constitution to go into operation. At the first session of the Senate

there were twenty senators.³ These were arranged in three groups, care being taken that the senators from the same State should be placed in different groups, and these were then assigned by lot to the classes prescribed by the Constitution. There were seven in the first class, seven in the second, and six in the third. When the senators from New York reported, one was placed in the third class and one in the first. North Carolina was the next State to send senators, and one was placed in the second class and the other in the third. In this manner, whenever a new State has been admitted, its senators have been assigned by lot to the different classes, so as to preserve as nearly as possible their numerical equality. The term of the senators of the first class expired in 1791, of the second in 1793, and of the third in 1795. It is, therefore, the first class whose term of office began March 4th of the present year (1905).

The provision for the election of a third of the Senate every second year was doubtless made to add to the stability and conservatism of that body. Although new members are thus introduced biennially, there will always be at least two-thirds who have had two years' experience or more and who are familiar with practical methods of legislation and the conduct of public affairs.

Vacancies in the Senate. Temporary Appointments.—With regard to the power of the executive of a State to make temporary appointments to fill vacancies in the Senate, it is to be noted that the vacancy must have happened during a recess of the legislature, and that the appointee is to hold office only until the next meeting of the legislature, which must then fill such vacancy. If, on account of a "deadlock," or other cause, the legislature should fail to choose a senator, the vacancy

3. Owing to a disagreement between the two Houses of the New York Legislature as to the manner of election, there was a delay of a few months in choosing senators for that State. North Carolina and Rhode Island had not yet ratified the Constitution.

cannot again be filled by the executive, and must continue to exist until filled by the legislature.

Clause 3.—No person shall be a senator who shall not have attained the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

Qualifications for a Senator.—The qualifications of a senator, as do those of a representative, relate to age, citizenship, and inhabitance. A senator must have reached the age of thirty years and been nine years a citizen of the United States. For the same reason as given in the case of a representative, a foreigner to be eligible to the Senate must have had at least fourteen years' residence in the United States. The remarks made in the case of a representative, with regard to foreign residence and travel, apply equally to the case of a senator. The provision as to inhabitance does not operate to compel either a senator or representative to remain an inhabitant of his State during the term for which he is chosen. If he is an inhabitant at the time of his election, the Constitutional requirement is satisfied.

The character evidently intended to be given to the Senate and the fact that it concurs with the President in making treaties suggest the reason why a higher qualification, in point of age and citizenship, was required in the case of a senator than in that of a representative. In both cases reasonable precautions were taken against any attempt on the part of a foreign Government to exercise an influence in the conduct of our affairs through their citizens who might become naturalized in this country and be elected to office.

Clause 4.—The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Vice-President.—As has been seen, the Speaker of the House is elected by the members thereof from among their own number. The presiding officer of the Senate is not, however, a member of that body. He holds his position as presiding officer not by virtue of selection, but under the constitutional provision that the Vice-President shall be President of the Senate. The framers of the Constitution did not at first contemplate such an officer as Vice-President, and, when it was decided later to provide for one, he was made President of the Senate, in order that he should not be without employment.

Clause 5.—The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

Other Officers of the Senate.—The “other officers” here referred to—secretary, sergeant-at-arms, etc.—are not senators. “It is customary for the Vice-President, before the close of each session, to vacate the chair in order that the Senate may choose a President *pro tempore*, who becomes presiding officer, in case the Vice-President should, in the recess, succeed to the Presidency in consequence of the death of the President, or his resignation, or inability to discharge the powers and duties of the office.”⁴ The President *pro tempore* is not restricted to a casting vote, but has his vote as senator. In case the Vice-President becomes President, the President *pro tempore* receives the salary of the Vice-President.

Clause 6.—The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

4. Flanders' Manual of Constitution, p. 62.

Trial of Impeachments.—It is characteristic of our form of government that no one of the three great departments—legislative, executive, or judicial—is confined exclusively to the exercise of its proper functions. In giving the Senate the sole power to try impeachments, the Constitution enjoins upon that body the performance of a duty that is wholly judicial in its nature. Our process of impeachment is borrowed from Great Britain, where the House of Commons impeaches and the House of Lords tries the impeachment. In sitting as a court of impeachment, the lords are not, as are our senators, required to be on oath or affirmation, but simply make a declaration on honor. A majority only (provided at least twelve concur in the verdict) of the lords is sufficient to convict, but two-thirds of the senators present must concur in order to secure a finding of guilt. This number was evidently selected, on the one hand, to obviate the extreme improbability of ever securing a conviction, owing to political sympathy, if a unanimous verdict were required; and, on the other, to guard against the danger of mere partisan convictions in times of excitement and high party feeling if the concurrence of a majority only were sufficient.

When the President is tried, the Chief Justice presides. The probable interest of the Vice-President in the succession to the Presidency is sufficient reason for excluding him from presiding over the Senate when it sits as a court of impeachment for the trial of the President.

There have been eight cases only of impeachment in the United States. One of these was against President Andrew Johnson, who was tried in 1868.⁵ Of the other cases, one was against a senator, one against a Cabinet officer, and the other five against Federal judges. Two convictions only were secured.

Clause 7.—Judgment in cases of impeachment shall not extend further than to removal from office, and dis-

5. For an account of the proceedings in this case, see Blaine's "Twenty Years in Congress," Vol. II., Chap. XIV.

qualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

Punishment in Cases of Impeachment.—In a subsequent clause of the Constitution it is provided that the President, Vice-President, and all civil officers of the United States shall, on impeachment and conviction, be removed from office; and in the clause just above quoted that judgment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. It will be seen, therefore, that in case of conviction on impeachment removal from office is mandatory, and that the Senate may in its discretion add the disqualification as to holding and enjoying office under the United States. In one of the two impeachment cases where a conviction was secured the punishment was limited to removal from office,⁶ in the other the full measure of punishment was inflicted.⁷

The punishment authorized to be imposed by the Senate as a court of impeachment is political only; but it is further provided that the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law. It is to be understood, of course, that the latter provision is applicable only where the offense is indictable. If it is merely political, there can be no trial and punishment at law.

Mode of Procedure.—The House having presented articles of impeachment, the Senate summons the party accused to appear before it on a designated day. When he appears, he is furnished with a copy of the articles of impeachment, and allowed time in which to answer them. The House makes a replication in writing to this answer, or defense, and states its readiness to prove the charges preferred. Counsel is allowed

6. Case of Judge Pickering.

7. Case of Judge Humphries.

the accused, and the trial proceeds according to the rules of law and parliamentary practice. If the party fails to appear in answer to the summons, the Senate may try the impeachment in his absence. This was done in one case.⁸

Section 4, Clause 1.—The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators.

Control of Elections by Congress.—From this clause it is evident that as to the times, places, and manner of holding elections for senators and representatives, except as to the places of choosing senators, Congress has complete control, so far as positive provisions of the Constitution do not interfere; also that the States have a like complete control, not subject to the exception noted above, if Congress does not choose to exercise its authority. The reason for excepting from Congressional control the places of choosing senators is obvious. The State legislatures choose the senators, meeting for this and other purposes usually at the State capitals, although accidental circumstances may make it necessary to meet elsewhere. It would be repugnant to our form of government for Congress to be given power to so interfere in local affairs as to fix the location of State capitals, or to say when a meeting of the legislatures elsewhere may be necessary or desirable.

If the State legislatures had been given absolute power to regulate the elections for the national Government, the existence of the Union would have been completely at their mercy, and it would have been possible for them to annihilate it by simply neglecting to provide for the choice of officers to administer its affairs. It is a plain proposition that every government ought to contain in itself the means of its own preservation.⁹

8. Case of Judge Pickering.

9. *Federalist*, No. 59.

Until 1842 the States were allowed to regulate, in their own way, the election of senators and representatives, but since that time Congress has, by law, prescribed: the mode of electing senators, previously explained; that the votes for representatives in Congress shall be by written or printed ballot or voting machine, where authorized by State law; that representatives shall be elected on the same day throughout the United States—viz., on the Tuesday after the first Monday in November—a later act, however, excepting those States whose Constitutions, at the time of the act (March 3, 1875), prescribed a different day; and, finally, that representatives shall be elected by separate districts, to be composed of contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. (Act of January 16, 1901.)

Clause 2.—The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Under this provision Congress may appoint two or more sessions for any year, and may designate the days for these sessions to begin.

Duration of Congress.—The duration of each Congress is two years—the term for which representatives are elected. As Congress is required by the Constitution to assemble at least once each year, it follows that each Congress will necessarily hold not less than two sessions. In addition, the President is authorized to assemble, on extraordinary occasions, both Houses, or either of them, in extra session. The terms of the representatives begin on the fourth day of March, and the first or long session of the Congress for which they are elected meets on the first Monday in December of the year following their election. The second or short session meets on the first Monday in December of the succeeding year. The duration of the first session

is not limited, except by the time for the beginning of the second; but the second session must end not later than noon on the fourth day of March next ensuing.

The Congresses are designated numerically in serial order, beginning with the first, which met in 1789. Each Congress and the long session thereof begin, therefore, in an odd-numbered year, and each short session begins in an even-numbered year. The legislation of each Congress is contained in a single volume, entitled the Statutes at Large of the Congress to which they pertain.

Section 5, Clause 1.—Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

Contested Elections.—The power to judge and determine a contested election to Congress is vested solely and entirely in that branch of Congress in which the contest occurs, and seems to be unlimited except by the responsibility of the members to their constituents. The States or their courts can exercise no jurisdiction whatever in the matter. The certificate of election furnished by the State authorities is *prima facie*, but not conclusive, evidence that the person holding it is entitled to a seat in Congress. Both the Senate and the House have gone behind such certificates, and determined from other sources the validity of the elections. In determining whether or not its members possess the necessary qualifications, neither House is limited to those prescribed in the Constitution, but may require such additional, personal qualifications as it sees fit. Under its authority to regulate elections for senators and representatives, Congress

may provide for the punishment of frauds and crimes committed at such elections.¹⁰

Quorum.—For every legislative body a designation is necessary of the number of its members required to transact business. A majority seems to be a suitable quorum. It serves to prevent, on the one hand, the enactment of laws by stealth or surprise or contrary to the wishes of a majority of the members; and, on the other, to prevent the obstruction of legislation, which would be easily possible if more than a majority were necessary to constitute a quorum. A smaller number than a quorum may, however, adjourn from day to day, and may be authorized to compel the attendance of absent members. By a rule of the House of Representatives, any fifteen members (including the Speaker, if there be one) may compel the attendance of absent members.

Clause 2.—Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Parliamentary Rules.—These provisions give each House complete control over its own parliamentary proceedings, its methods of doing business, its rules of order, the observance of order on its floor, and the conduct of its members. At the beginning of the first session of any Congress it is customary for the House to appoint a committee on rules and to adopt, pending its report, the rules of the preceding House. The Senate, being a continuous body, has a set of standing rules.

Counting a Quorum.—The House of Representatives of the Fifty-first Congress adopted a rule which authorized the Speaker to count in members present in the House, but refusing to vote, in order to make up a quorum. Under the previously existing rule a member was not “constitutionally present” unless he voted. This rule gave a minority great power to delay

10. U. S. v. Gale, 109 U. S. 65.]

or defeat legislation by simply refusing to vote and then raising the question of a quorum. The Supreme Court has sustained the validity of the rule first mentioned. Neither House may, it was said, "by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be obtained." But within these limitations the power to make rules "is absolute and beyond the challenge of any other body or tribunal."¹¹

Punishment of Members.—Either House may punish its members for any disorderly behavior occurring during a session of Congress, whether within or without the walls of the House, and may expel a member for any misconduct inconsistent with his trust and duty, whether or not committed during a session of Congress, and whether or not punishable at law. The power of expulsion is unlimited, and the judgment of the two-thirds majority is final. It is held that this is a power which, by common parliamentary law, would exist without being expressly conferred, because it is a power of protection necessary to the safety of the State.

Power to Punish for Contempts.—The power which the Constitution gives each House to punish for contempts is limited to its own members, and the Supreme Court has decided that they have no general power to punish for contempts independent of the constitutional grant. But there are cases where the Constitution expressly confers upon the Houses powers which are in their nature somewhat judicial, and which require the examination of witnesses, such as the punishment of its own members for disorderly conduct or failure to attend sessions; cases of contested elections, or in regard to the qualifications of its members, and cases of impeachment. In these cases and perhaps a few others, where a witness refuses to attend or testify, either

11. U. S. v. Ballin, 144 U. S. 1,

House may enforce the duty by fine or imprisonment as a punishment for contempt. If, however, the House is acting beyond its jurisdiction or without authority, it cannot punish a person for contempt in refusing to answer, and any person against whom such a punishment is adjudged has a right to seek redress through a collateral inquiry into the grounds on which the order was made.¹² Such redress will usually take the form of damages for false imprisonment against the officer who executed the illegal order of arrest. It is the better opinion that any sentence of imprisonment imposed must terminate with the adjournment of Congress, for, although the legislative power continues, the legislative body ceases to exist at the moment of its adjournment or periodical dissolution.

Clause 3.—Each House shall keep a journal of its proceedings, and, from time to time, publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

Journals of Proceedings.—The purpose of a journal is to preserve in permanent form a record of the proceedings of Congress. It is customary for both Houses to hold open sessions, and their proceedings are at once communicated to the people through the public press; but open sessions are not required, and both Houses could, if they saw fit, conduct all their proceedings behind closed doors. If they should resolve to do this, the great importance of the provision requiring the publication of their journals from time to time would at once become apparent to all. When business of a confidential nature is being considered by either House, all persons, except members and officers, are excluded. It is not customary to make known what occurs during such closed sessions. The Senate also holds “ex-

12. *Kilbourn v. Thompson*, 103 U. S. 168.

ecutive sessions," in which confidential communications from the President, such as nominations to office, treaties, etc., are considered. The record of proceedings had during those sessions is kept in a separate journal. The injunction of secrecy may be removed and the contents made known to the public; but otherwise the record is accessible only to certain privileged persons.

The Yeas and Nays.—The usual method of voting in Congress is *viva voce*, the presiding officer deciding by his ear, or, in case of doubt, by counting, the members rising for this purpose, or by the aid of tellers where his count is questioned by a member; but, at the desire of one-fifth, the yeas and nays may be taken on any question. This is a provision of great importance. "It is a safeguard against the acts of a reckless or corrupt majority. By placing in the hands of so small a minority the power to demand the yeas and nays, and to make a lasting record of all votes which shall go before the people, it keeps each member alive to his personal responsibility to his constituents, and effectually prevents all subsequent concealments as to acts for which he may be called in question."¹³ Unfortunately, this salutary provision has at times been made use of by a minority solely to waste time in calling rolls, and so delay or defeat the passage of bills.

Clause 4.—Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

No comment here is necessary, except to say that this provision was made necessary by the division of Congress into two Houses. It serves to prevent either House from interrupting the regular work of legislation by improper adjournments.

13. Pomeroy, Const. Law, Sec. 221.

Section 6, Clause 1.—The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to, and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

Compensation of Members.—Under the Articles of Confederation, the members of Congress were paid by their respective States, but it was considered that this practice made them too dependent on their States and too much inclined to subordinate national to local interests. The Constitution, therefore, wisely provided that members of Congress should be paid out of the national Treasury, and thus added an important element to the stability of our Government.

In Great Britain the members of Parliament receive no compensation. Such a system, however, is not well calculated to bring out the best talent of a country for its services. If it had been in vogue in the United States, it would have operated in the past to deprive the Government of the services of many an able statesman and legislator, who would not have been financially able to serve without compensation as a member of Congress.¹⁴

Privilege of Members, Freedom from Arrest.—The provisions in our Constitution with regard to the privilege of freedom from arrest and immunity of speech or debate are substantially the same as those of the English law. It is a privilege that has always been considered indispensable to a free, representative

14. Payment of members of Congress for the different periods has been as follows: 1789 to 1815, \$6.00 a day; 1815-1817, \$1,500 a year; 1817-1855, \$8.00 a day; 1855-1865, \$3,000 a year; 1865-1871, \$5,000 a year; 1871-1874, \$7,500 a year; 1874—, \$5,000 a year.

government. Except for treason, felony, and breach of the peace, members of Congress are privileged not only from arrest, but from service of all process the disobedience to which is punishable by attachment of the person, such as a summons to appear as a witness or to serve as a juror. The privilege does not, therefore, extend to mere citations or writs of summons in civil actions. The reason on which this privilege is based is that the member ought not to be taken bodily into custody, or required personally to appear before the courts when he has superior duties to perform as a legislator in another place.¹⁵ The privilege extends as well to delegates from Territories as to senators and representatives from States, and is operative from the time a member leaves his home to attend a session of his House until he returns, allowing a reasonable time for the journey in each direction.

If the privilege be violated and a member arrested, the arrest is void, and the member may be discharged on motion to the judge or court issuing the warrant of arrest, by writ of *habeas corpus*, or on warrant from his House, executed by its sergeant-at-arms or other proper officer. Being unlawful, the arrest is a trespass and the officer making it and others concerned may be proceeded against in the ordinary courts of justice as in other cases of unauthorized arrest.

Immunity of Speech and Debate.—This privilege is to be construed liberally, as its purpose is to secure the greatest freedom in the discussion of public measures. "It should not be confined to delivering an opinion, uttering a speech, or haranguing in debate, but extended to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office, whether upon the floor of the House or in committees, and also in the official publication of the proceedings of the legislative body."¹⁶ It is

15. 1 Story, Constitution, Sec. 860.

16. Black, Const. Law, p. 549.

the better opinion, perhaps, that the privilege does not extend to a member who publishes his own speech which contains libellous matter, as this is an independent act, not in any manner connected with his duties as a legislator.

Clause 2.—No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments whereof shall have been increased during such time; and no person, holding any office under the United States, shall be a member of either House during his continuance in office.

Disability to Hold Office.—The prohibition contained in the first part of this clause was intended to guard against the creation of lucrative offices, which members themselves might hope to fill. The protection in this particular is but partial, however, as any civil office created or the emoluments of which have been increased during the term of a member may be accepted and held by him as soon as his term has expired. The second part of this clause is in striking contrast with law and practice in England. "As Parliament is organized, the principal administrative officers must be members of one or the other House." It was doubtless intended to prevent members of Congress from being improperly influenced in the performance of their duties as such. Its operation is as follows: If a member of Congress is appointed to any office under the United States, he must resign his seat; if he accepts such an office without resigning as a member, it operates as a forfeiture of his seat; if an officer of the United States is elected a member of Congress he may, without disqualification, continue to perform the duties of his office after such election, but he must resign it before taking his seat as a member. It does not operate to prevent a member of Congress from holding a State office.

Section 7, Clause 1.—All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

Origin of Revenue Bills.—This provision was substantially copied from the British Constitution, which requires all revenue bills to originate in the House of Commons. (The House of Lords cannot propose amendments.) But the wisdom, or at least the necessity, of introducing it into our Constitution has been seriously questioned, for the reason that the class distinctions and conflicting interests which made the possession of this prerogative so essential to the English Commons do not exist in any form in this country. Both senators and representatives are ultimately responsible to the same constituents, and there is no good reason why the House should be more careful of the public money than the Senate. The fact that its members are more immediately dependent on the people, and that its composition can be more quickly changed, should its legislation prove unpopular, may, however, suggest the reason why exclusive authority to originate revenue bills was vested in the House of Representatives.

What Are Revenue Bills.—According to the generally accepted meaning of the terms, “raising revenue” is equivalent to “levying taxes.” A bill, therefore, whose purpose is not to create a revenue by taxation, although revenue may incidentally result therefrom, does not come within the limitation of this clause. Such a bill would be one to establish a post-office or to provide for the sale of public lands. A bill which operates to decrease or abolish existing rates of taxation is as much a revenue bill as one whose effect is to increase such rates or provide entirely new ones.

Clause 2.—Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United

States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and, if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law.

The Veto Power.—This power vested in the President is not executive, but essentially legislative in its nature. It operates as a check on the hasty enactment of unwise or improper laws. The provision limiting to ten days the time in which the President may exercise his veto power is one of great importance. In the absence of such a provision the President could prevent or indefinitely suspend all legislation by inaction, and would not be required to disclose his ground of opposition or make any explanation of his views to Congress or the country. A counter-check on Congress is found in the provision that it cannot by adjournment prevent the exercise of this power by the President.

As to the grounds on which the President may interpose his objections to a bill, the Constitution prescribes no limitations. He is required to return the bill with "his objections," but these may relate to the constitutionality of the proposed measure, its expediency, its economic or political wisdom, its relation to

other laws or treaties, or may be entirely arbitrary or capricious. It is to be noted that the President cannot approve one or more provisions of a bill and disapprove the others. He must act on the bill as a whole, and approve or reject the entire act. It was doubtless the intention of the framers of the Constitution to require the President to state his objections to every bill which he refused to sign, and this was generally observed until the administration of President Jackson, when the practice was originated of allowing bills received within ten days of the adjournment of Congress to go unsigned, thus in effect vetoing them without having to assign a reason therefor. This is called "the pocket veto."

The two-thirds required to pass a bill over the President's veto is understood to be two-thirds of the members present (provided, of course, there is a quorum), and not two-thirds of the whole number of members of each House.

Clause 3.—Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Designations for Enactments of Congress.—If it were not for the provisions of this clause, Congress might pass bills, and, by calling them "orders" or "resolutions," avoid sending them to the President for his approval. It furnishes, therefore, a very important check upon Congress in its relation to the executive.

Either House alone may pass simple resolutions, or both together may pass concurrent resolutions, joint resolutions, or bills.

Concurrent Resolutions.—The concurrent resolution is used in expediting the business of Congress in matters pertaining to the collective interests of the two bodies. When agreed to by both Houses, it is engrossed on paper and attested by the clerk of the House and secretary of the Senate. It is not printed and does not appear among the statutes. Its resolving clause is as follows: "Resolved by the House of Representatives, the Senate concurring" (or *vice versa*).

Joint Resolutions and Bills.—The joint resolution appears to have originated in the House of Representatives in 1871. At first it was used for temporary as distinguished from permanent enactments. But the distinction has been lost sight of, and at the present time a joint resolution is, in all respects, equivalent to a bill. The only difference that can be noted is in the phraseology of the enacting clauses. That of a joint resolution is as follows: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled." That of a bill as follows: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled."

Section 8, Clause 1.—The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare, of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States.

Taxation.—The power of taxation here conferred upon the general Government is limited in respect to the purposes for which it may be exercised, and also the manner in which the taxes may be levied. The language of this clause is so far ambiguous as to give rise to contention as to the real nature of the power it confers upon Congress; but it is now the generally accepted interpretation that the clause is to be understood as if it read: "Congress shall have power to lay and collect taxes,

etc., *in order* to pay the debts and provide for the common defense and general welfare of the United States.” If this were not the case, and if the power to provide for the common defense and general welfare of the United States were taken to be separate and independent grants of power, not related to the purposes of taxation, our theory of the nature of the Federal Government would have to be changed. It would no longer be a Government of limited powers, but would be omnipotent, for the reason that providing for the common defense and general welfare might be taken to include anything the Government could possibly do.¹⁷ It appears, therefore, that Congress is limited in its powers of taxation to one of the three purposes named. The first two being clear and specific, questions as to the constitutionality of the tax laws of Congress have arisen chiefly under the third—the power to promote the general welfare. It is on this ground that the constitutionality of protective tariff laws has been questioned.

Limitations on Methods of Levying.—In regard to the manner in which they are to be levied, Congress is limited by the rules that duties, imposts, and excises must be uniform throughout the United States, and that direct taxes are to be levied according to the population.

Implied Limitation.—There is a further limitation upon the taxing power of the United States, not expressed in the Constitution, but implied from the nature of our system of government: The Federal Government cannot so exercise its power of taxation as to curtail the rightful powers of the States, destroy the means or agencies employed by them in the exercise of these powers or interfere with the free discharge of their constitutional functions.¹⁸ Each government within the sphere of its legitimate activities must be taken to be supreme. In

17. Pomeroy, *Const. Law*, Secs. 273-4.

18. *McCulloch v. Maryland*, 4 Wheat. 316.

view of this limitation on its taxing power, it has been held that Congress cannot tax the revenues of a municipal corporation,¹⁹ nor lay a tax on income derived from municipal bonds,²⁰ nor impose a tax on the salary of a judicial officer of a State,²¹ nor impose taxation on the process or proceedings of the State courts.²² Similar limitations on the taxing power of the States will be discussed later.

Kinds of Taxes.—Congress may lay and collect taxes, duties, imposts, and excises. "Taxes" is the most comprehensive of these terms, and in its broadest sense includes all the others, but, as it is sometimes used in contradistinction to the words of more restricted scope and specific meaning, it was proper that all should be enumerated. "Duties" includes taxes on imports and exports, but, as a subsequent clause of the Constitution forbids the taxing of exports, the term as used adds nothing to the scope of the taxing power. It is thus made practically synonymous with "imposts," which are taxes levied on imported goods. "Excises" means taxes laid upon the manufacture, sale, or consumption of commodities within the country and upon licenses to pursue certain occupations.²³ A "capitation tax" is a poll tax—that is, a sum demanded from each person without regard to his property or business.

Taxes are classified generally as direct and indirect. As these terms are used in political economy, and as generally understood, a direct tax is one demanded of the person who it is intended shall pay it, as a tax on land or a poll tax; while an indirect tax is one demanded from one person in the expectation that he will indemnify himself from others, such as a tax on imports.²⁴

19. *U. S. v. Railroad Co.*, 17 Wall. 322.

20. *Pollock v. Trust Co.*, 157 U. S. 429.

21. *Collector v. Day*, 11 Wall. 113.

22. *Smith v. Short*, 40 Ala. 385.

23. *Cooley on Taxation*, 3.

24. *Burroughs, Taxation*, Sec. 3.

Income Taxes.—But when the meaning of the term “direct tax” as used in the Constitution first came before the Supreme Court, that body decided that it was to be taken in a narrower sense than above indicated, and limited to capitation taxes and taxes on land.²⁵ Income taxes were, therefore, not regarded as direct taxes, and when collected by the United States during the Civil War and the following years, they were levied according to the rule of uniformity, and not according to population; but when this question again came before the Supreme Court in consequence of the income tax law of 1894, the earlier decisions were overruled, and it was held that income taxes, whether laid on real or personal property or the income therefrom, are direct taxes within the meaning of the Constitution; and, to be valid, must be apportioned according to the respective numbers of the States.²⁶ Taxes on the circulation of State banks²⁷ and taxes on the devolution of title to real estate²⁸ are not, however, to be included in this category; they are properly regarded as excises.

Power of Taxation Coextensive with Jurisdiction.—The general power of Congress to lay and collect taxes, duties, imposts, and excises extends to all places over which the Government extends—to the District of Columbia and to all the other Territories of the United States as well as to the organized States.^{28½} Direct taxes may be apportioned among the Territories and the District of Columbia as well as the several States; but Congress is not bound to include the Territories and the District within the operation of a law levying a direct tax.²⁹ The status of our newly acquired Territories

25. *Hylton v. U. S.*, 3 Dall. 171.

26. *Pollock v. Trust Co.*, 158 U. S. 601.

27. *Veazie Bank v. Fenno*, 8 Wall. 533.

28. *Scholey v. Rew*, 23 Wall. 331.

28½. *Loughborough v. Blake*, 5 Wheat. 317.

29. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of U. S.*, 9 Wheat. 738.

under the revenue laws of the United States will be referred to later. (See page 193.)

Clause 2.—To borrow money on the credit of the United States.

Power to Borrow Money.—In addition to the power of raising money by taxation, Congress has authority to borrow money on the credit of the United States. The language of this grant is as broad as possible, and the power it confers must be taken as coextensive with the needs and activities of the Government. Any question, therefore, which can arise as to the borrowing of money, or the use to which it is to be put, will be one of policy rather than constitutional power.

As the power to borrow is unlimited, so also are the means which Congress may employ in its exercise. Money may be raised by the issue and sale of Government bonds, or by issuing certificates of indebtedness, or scrip, or other forms of obligations for debts or services rendered; or the same purpose may be accomplished by the issue of Treasury notes, either directly or indirectly through the instrumentality of the national banks.²⁹

Clause 3.—To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Commerce.—It will be recalled that the lack of all power in the Congress of the Confederation to regulate commerce was one of its greatest weaknesses, and that the very first movement to amend the Articles of Confederation so as to make them adequate to the exigencies of the Union originated in an attempt to confer upon the general Government enlarged powers over this subject. The ruinous state of commerce as it existed prior to the adoption of the Constitution was a cause for great alarm. Knowing the weakness of Congress and its inability to enforce opposing measures, foreign nations regulated their commerce

²⁹. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of U. S.*, 9 Wheat. 738.

with the United States entirely in their own interests. Most of the then States had harbors on the ocean and, in addition to their foreign commerce, were engaged in trade among themselves. There could, of course, be no uniformity of regulations touching such trade, but so many embarrassing and unreasonable regulations were actually adopted that mutual distrust, jealousies, and rivalries soon threatened the very existence of the Union itself. All thinking men saw the necessity of making the grant as extensive as the mischief, and Congress was given power to regulate "commerce with foreign nations, and among the several States, and with the Indian tribes."

What Is Included.—This power of Congress, although it is to be construed liberally, must be strictly limited to the three classes of commerce mentioned in the Constitution. Each State, therefore, retains full and complete control over all commerce carried on wholly within its own borders; and it is not until commerce passes the boundaries of a State and begins a course which is to end in another State or in a foreign country that it becomes subject to the regulation of Congress.³⁰ The Supreme Court of the United States has given a broad construction to this term. It is not limited to the sale and exchange of commodities, but includes their transportation, whether this be by land or sea, and also the means, agencies, or instrumentalities by which commerce is carried on. It includes passenger and freight traffic and the transmission of telegraph messages. It extends to the regulation and government of seamen on American ships, to the establishment of rules of navigation, the law of the road at sea, and to the marine system of lights and signals; to the protection and security of commerce, including laws respecting light-houses, beacons, buoys, dykes, dams, levees, the improvement of rivers and harbors, derelicts, and wrecks of the sea; to the designation of ports of entry and delivery; to the charges of

30. *Veazie v. Moor*, 14 Howard, 567.

railroads engaged in inter-State commerce, and to many other subjects.³¹

When Exclusive, When Concurrent.—As to the control of Congress and the States over commerce, the following rules may be stated as a result of the authorities:

1. If it is a subject of commerce over which Congress is given paramount control, or with regard to which it has legislated, the States cannot lawfully adopt any measures which, on the one hand, tend to regulate, obstruct, or interfere with such commerce, or, on the other, is inconsistent with the legislation of Congress.³²

2. If the subject is national in its character and can be properly regulated only by a uniform system, the States cannot lawfully legislate on the subject, even if Congress does not; for, in that case, it is to be assumed that Congress intends the subject to be free from regulations or restrictions.³³

3. If the subject is of a local and limited nature and likely to be most wisely dealt with by varying regulations, suited to the different localities, the States may legislate in the absence of an act of Congress on the same subject.³⁴

4. If State legislation, touching any matter of foreign or inter-State commerce, is in the nature of a proper police regulation and not intended as a regulation of such commerce, even though it may incidentally or remotely affect the same, it will be valid in the absence of a law of Congress covering the same ground.³⁵

Numerous cases involving a conflict of jurisdiction between State and Federal Governments have naturally arisen, and the

31. *U. S. v. Craig*, 28 Fed. 795; 2 Story, Constitution, Secs. 1075, 1076.

32. *Brown v. Maryland*, 12 Wheat. 419; *Gibbons v. Ogden*, 9 Wheat. 1.

33. *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465.

34. *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. 245.

35. *Sherlock v. Alling*, 93 U. S. 99.

decisions of the Supreme Court thereon have done much to clearly define the power of these Governments with regard to matters concerning foreign or inter-State commerce. In regard to

Navigation, it has been decided that the power of Congress extends to all navigable waters of the United States, and navigable waters are those which "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway, over which commerce is or may be carried on with other States or foreign countries.³⁶ It extends, also, to all the incidents of such navigation as a part of foreign or inter-State commerce, and to the means and instruments by which it is carried on. Hence, ships, tugs, towboats, etc., navigating the high seas and the great waterways of commerce, are not subject to conditions or restrictions imposed by the States, except those which relate to the police of their own harbors.³⁷

Regulation of Ports and Harbors. Pilotage.—These are subjects over which it is conceded the States have full power to legislate until Congress chooses to enter the field, when, of course, any State legislation inconsistent with that of Congress has to give way. They are subjects, too, which are very generally left to the control of local legislation, as being better calculated than a uniform system to meet all the requirements of varying local conditions.

Ferries and Bridges.—The authority to regulate ferries on the navigable rivers of the United States has never been claimed by the general Government, but has always been exercised by the States. Congress, having the power of full control over all the navigable waters of the United States, may authorize or prevent the construction of bridges over navigable rivers. The States may also authorize such bridges, provided

36. The *Daniel Ball*, 10 Wall. 557, 563.

37. *Moran v. New Orleans*, 112 U. S., 69; *Sinot v. Davenport*, 22 How. 227. **J**

they do not interfere with existing regulations of Congress or constitute a material impediment to commerce. If bridges have been so constructed, Congress may, in its discretion, having in view the greatest good to the general commerce of the country, order them abated as nuisances or legalize them and declare them to be lawful structures.³⁸

Immigration, Embargo.—Since commerce is not limited to an exchange of commodities, but includes as well intercourse with foreign nations, and since intercourse includes transportation of passengers, it is this commerce clause of the Constitution which gives Congress its authority to control absolutely all immigration into the United States. It furnishes authority for the statutes which forbid the importation of alien laborers under contract and which exclude the Chinese.³⁹ It was also resorted to as authority for the Embargo Act of 1807. The constitutionality of this measure was never passed upon by the Supreme Court, but it was upheld by the district courts. Story regards this exercise of the great power of Congress over commerce as going to its extreme limits.⁴⁰

State Taxation.—There have been numerous cases of conflict between the power of the States to tax property found within their borders and the power of Congress to regulate commerce. The decisions on these cases have established the following points: Any tax distinctly laid by a State on commerce which comes under the control of Congress is void, even though Congress has refrained from legislating on the subject.⁴¹ Commerce which starts within a State in transit to another State or a foreign country, or which comes into a State, as its destination, from without, is inter-State commerce equally with that which

38. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; *Wheeling Bridge Case*, 13 How. 518.

39. *Passenger Cases*, 7 How. 282.

40. 2 Story, *Constitution*, Secs. 1289-1292.

41. *McCulloch v. Maryland*, 4 Wheat. 316.

is merely passing through a State.⁴² A State cannot tax goods imported from abroad so long as they remain in the hands of the original importer, or, having left his hands, so long as they remain in the original packages of importation. But when the importer has parted with them, or when the original cases have been broken up, then the goods become taxable as a part of the general property in the State.⁴³ "While inter-State commerce cannot be regulated by a State, by the laying of taxes thereon in any form, yet whenever the subject of taxation can be separated, so that that which arises from inter-State commerce can be distinguished from that which arises from commerce wholly within the State, the distinction will be acted upon by the courts, and the State permitted to collect that arising from commerce wholly within its own territory."⁴⁴ This applies particularly to railroad, telegraph, and sleeping-car companies. Goods produced in any State, but intended for exportation, are subject to taxation in the State of production until actually put in transit for their destination beyond the State limits, or delivered to a carrier for that purpose; and, conversely, goods sent from one State to another cease to be in transit and are taxable the moment they reach their destination and are there offered for sale, provided they are taxed as other goods are, and are not unfavorably discriminated against because they are the product or manufacture of another State.⁴⁵ The business of insurance, as ordinarily conducted, is not commerce. Hence, a State may tax foreign insurance companies or prescribe the conditions under which they may do business within its limits.⁴⁶ A State

42. State Freight Tax Cases, 15 Wall. 232.

43. Brown v. Maryland, 12 Wheat. 419; Cook v. Pennsylvania, 97 U. S. 566.

44. Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192.

45. Woodruff v. Parham, 8 Wall. 123.

46. Paul v. Virginia, 8 Wall. 168; Hooper v. California, 155 U. S. 648.

may generally tax trades, professions, and occupations;⁴⁷ it may tax brokers dealing in money or exchange,⁴⁸ but it cannot tax "drummers" in such a way as to discriminate against the introduction and sale of the products of another State.⁴⁹

Police Power.—The police power of the States and the commercial power of Congress often come in conflict, but they are coördinate powers and must exist together. Congress, under pretense of regulating commerce, must not encroach upon the domestic police of the State; neither must the State, under guise of its police power, interfere with the paramount control of Congress over commerce. A State may enact sanitary, quarantine, and reasonable inspection laws; it may take such action as will prevent the introduction into the State of convicts, paupers, and persons or animals suffering from contagious or infectious diseases, but it must not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection, nor, under cover of its police power, substantially burden or prohibit foreign or inter-State commerce.⁵⁰ A State may not lay a tax on immigrants, as this would amount to a regulation of commerce;⁵¹ but it may require a report to be made of the passengers brought into its ports from abroad and prescribe a penalty for failure to comply with its terms.⁵² With regard to intoxicating liquors shipped into one State from another or from a foreign country, the case of *Leisy v. Hardin*,⁵³ overruling *Pierce v. New Hampshire*,⁵⁴ holds that it is a subject which properly comes under the power of Congress to regulate

47. *Ficklen v. Shelby, etc.*, 145 U. S. 1.

48. *Nathan v. Louisiana*, 8 How. 73.

49. *Walling v. Michigan*, 116 U. S. 446.

50. *Railroad Co. v. Husen*, 95 U. S. 465.

51. *Henderson v. Mayor of City of N. Y.*, 92 U. S. 259.

52. *New York v. Miln*, 11 Pet. 102.

53. 135 U. S. 100.

54. *License Cases*, 5 How. 504.

commerce, rather than under the police power of the States; but an act of Congress, commonly known as the "Wilson Law," excepts the traffic in intoxicating liquors from the control of Congress, and places it under the control of the separate States to regulate or prohibit as they see fit.⁵⁵

Inter-State Commerce Act.—By this act an Inter-State Commerce Commission is created with power to investigate complaints and to enforce the provisions of the law, which was designed to prevent unjust discriminations, whether by rebate, special rate, drawback, or other device, also the giving of undue preference to any person, corporation, or locality, or to any particular description of traffic. The Commission has power also to decide what rates are just and reasonable, and to prevent a greater aggregate charge being made for a "short haul" than for a "long haul." This act applies to all common carriers engaged in the transportation of persons or property, by rail or water, or both, from one State to another, or from a point within the United States to a foreign country, and they are required to make annual reports to the Commission, giving certain statistics of their business. The act does not apply to traffic carried on wholly within a State.

Commerce with Indian Tribes.—The Indian tribes are regarded as dependent, domestic nations. They have power to make treaties with the United States, but are under the legislative control of Congress. In their domestic government, however, they are left largely to their own rules and traditions. All intercourse or commerce to which Indians are parties, whether it be between white persons and Indians or between different Indian tribes or their members, and whether upon the reservations, in the Territories, or within the States, is subject to the control of Congress.⁵⁶ And Congress may provide for the punishment

55. As to the constitutionality of this statute, see *In re Rahrer*, 140 U. S., 545.

56. *U. S. v. Barnhart*, 22 Fed. 285; *U. S. v. Bridleman*, 7 Fed. 894.

of acts or conduct growing out of or connected therewith, resulting in injury either to the Indian or the other party, or calculated to interrupt or destroy its peaceful or beneficial character.⁵⁷

Clause 4.—To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States.

Naturalization.—Naturalization is the act by which, in pursuance of lawful authority, one who is not otherwise entitled to the rights, privileges, and immunities of a natural-born citizen has these attributes of citizenship conferred upon him. Under the authority conferred by this clause, Congress has enacted a uniform rule of naturalization which provides: for a residence of five years before the applicant may be admitted to citizenship; for a declaration of intention to become a citizen, which must be made at least two years prior to the final application; that at the time of making his final application the applicant shall declare on oath or affirmation that he will support the Constitution of the United States; that he renounces and abjures all allegiance and fidelity to any foreign prince or State, and, in case he shall have borne any hereditary title, or have been of any of the orders of nobility in the kingdom or State from which he came, that he expressly renounces such title or order of nobility; that at the time of making his final application the applicant shall have been a resident of the State or Territory in which he then resides for at least one year, and, during that time, shall have behaved as a man of good moral character, attached to the principles of the Constitution; and, finally, that residence, character, etc., must be proved by wit-

57. U. S. v. Bridleman, 7 Fed. 894.

nesses.⁵⁸ The privilege of naturalization is limited to "aliens being free white persons, and to aliens of African nativity and persons of African descent."⁵⁹

In addition to the process of naturalization above described, naturalization may be effected by a grant of the privilege to certain named individuals; by the acquisition by the United States of territory formerly belonging to a foreign power, with its people, the latter thereupon becoming citizens of the United States, as was the case in the annexation of Texas; and by a collective naturalization upon the admission of a Territory to Statehood, including all those who are resident in the Territory and included in the new political community, but who were not previously citizens of the United States.⁶⁰

Power of Congress over Naturalization.—The power to provide for a uniform system of naturalization of aliens is exclusive in Congress, and the propriety of this provision is evi-

58. Infant children of aliens, though born out of the United States, if dwelling within the United States at the time of the naturalization of their parents, become citizens by such naturalization. *West v. West*, 8 Paige, N. Y. 433.

If a widow and her infant son, who are citizens of a foreign country, come to this country, and she marries a naturalized citizen of the United States, she thereby becomes a duly naturalized citizen, and her son also thereby becomes a citizen. *U. S. v. Kellar*, 13 F. R. 82.

A soldier of the age of twenty-one years or over, regularly discharged from the Army of the United States, may be admitted to citizenship without a previous declaration of intention and with a single year's residence.

An alien of twenty-one years or over who has served five consecutive years in the United States Navy or one enlistment in the Marine Corps, and has been honorably discharged, shall be admitted to citizenship without a previous declaration of intention.

No alien who shall be a native citizen or subject of any country with which the United States shall be at war at the time of his application shall be then admitted to citizenship.

59. Rev. St. U. S., Sec. 2169. A person of half white and half Indian blood is not a "white person" within the meaning of the naturalization laws.

60. *Boyd v. Nebraska*, 143 U. S. 135.

dent.⁶¹ As will be seen from a subsequent clause of the Constitution, the citizens of each State are entitled to all the privileges and immunities of citizens in all the other States. If each State possessed the power of investing whomsoever it might choose with the character of citizenship, it could grant to any class or race of foreigners all the rights and privileges in other States which those States would be able to confer upon persons of their own choice, thus introducing an element of intolerable discord.⁶² Again, since the Federal Government has charge of all our foreign intercourse, and since American citizens have the right of appealing to that Government for protection against all aggressions upon their rights by foreign governments or their agents, it is proper that the United States should determine who may become its citizens and so be entitled to its protection.

Power of the States over Aliens.—Although the States cannot grant the privilege of naturalization to aliens, they have still a wide field of legislation with regard to their rights and disabilities. They may grant or withhold from them the privilege of holding and transmitting real estate; they may confer upon them the right of suffrage under such conditions as they see fit to prescribe, and may thus extend to them the privilege of voting for electors of President and Vice-President, for representatives, and for the members of the State Legislatures who choose senators. In this sense and to this extent a State may invest aliens with the privileges of its own citizenship, but it cannot make them citizens of the United States, nor confer any rights and immunities that will not be restricted to its own territory and its own laws.

Expatriation.—The right of expatriation is the right of a person on removing from one State to another to sever his polit-

61. *U. S. v. Villato*, 2 Dall. 370. The early case of *Collet v. Collet*, 2 Dall. 294, holding that a State might pass naturalization laws, was soon discredited.

62. *Pomeroy*, Const. Law, Sec. 386.

ical connection with the former, and be exempt from personal or political duties toward it, and to acquire the rights and standing of a citizen in the latter.⁶³ Congress has declared that "expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness"; and "any declaration, instruction, opinion, order, or decision of an officer of the United States which denies, restricts, impairs, or questions the right of expatriation is inconsistent with the fundamental principles of the Republic." The decisions of the courts accord with this declaration. Many governments hold, on the contrary, that allegiance is perpetual and cannot be renounced.

Bankruptcy.—A bankrupt law is one which operates, under certain specified conditions, to discharge a debtor from the legal obligation to pay his debts. A general condition of these laws is that the debtor shall surrender all his property (except certain property or property to a limited amount, sometimes specially exempted) for the benefit of his creditors. The English bankruptcy laws related to merchants and traders and could be taken advantage of only by them, but our laws are not so limited.

The Constitution gives Congress power to enact uniform laws on the subject of bankruptcies, but it has been held that this is not exclusive, and that it is within the authority of the States to pass laws on the subject in the absence of such legislation by Congress. But when Congress does adopt a measure of this character, it at once operates to supersede and suspend all State legislation on the subject until the national law shall be repealed.⁶⁴ State laws, when valid and in force, are limited in their operation to debts contracted after their enactment, since to make them applicable to debts previously contracted would

63. Black, *Const. Law*, p. 528.

64. *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 212.

violate that provision of the Constitution which forbids the States to enact laws impairing the obligation of contracts. Nor can they be made to apply to non-resident creditors; unless it be with their own consent.⁶⁵ But since there is nothing in the Constitution which prohibits Congress from passing laws which impair the obligation of contracts, it is universally conceded that a national bankrupt law, though it includes such features, with provisions compulsory upon creditors, is valid and constitutional.⁶⁶ A bankrupt law may recognize and give to those who become subject to its provisions the benefit of the exemption laws of the States in which they respectively reside, and the fact that these differ in liberality is not to be regarded as depriving the bankrupt law of the character of uniformity. Indeed, this is a just and equal rule, since the bankrupt's debts are contracted on the understanding that he is entitled to the exemptions provided by the laws of his own State, and creditors cannot complain when he is allowed them.⁶⁷

Congress has enacted four different bankrupt laws. That of 1800 was repealed in 1803; that of 1841 was repealed in 1843; that of 1867 was repealed in 1878. The present law was enacted in 1898.

Clause 5.—To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures.

Coining Money.—This clause and a subsequent one, which forbids the States to coin money, operate to place the whole subject of coining money and regulating its value under the exclusive control of Congress. The reason for so placing it is apparent. If the several States might coin money, fix its standard of purity, and determine its value, all uniformity in exchanges, in prices, in the values of commodities, would at once

65. *Gilman v. Lockwood*, 4 Wall. 409.

66. *Fed. Cases*, Nos. 4,559 and 10,632.

67. 13 *Fed. R.*, 659; *Cooley*, *Prin. Const. Law*, p. 81.

be lost, and the business of the community would be thrown into hopeless derangement.⁶⁸ To coin money is to stamp pieces of metal for use as a medium of exchange in commerce, according to fixed standards of value. The power to regulate the value of coined money includes the power to determine what denominations of money shall be struck at the mint,⁶⁹ and also to determine what proportion of pure metal and what of alloy shall enter into the composition of each coin. And when a bimetallic standard is maintained, it includes the right to make such adjustments as may be found necessary to maintain a uniform standard. Congress has regulated the value of foreign coin by declaring that their value, "as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value."

Under this clause of the Constitution is often discussed the so-called legal-tender acts, by which Congress, during the Civil War, issued a large amount of Treasury notes and made them legal tender in the payment of private debts and all public dues, except duties on imports and interest on the public debt. Making Treasury notes legal tender is not, however, coining money, and the Supreme Court, in sustaining the validity of these acts, as applied to the payment of either pre-existing or subsequently contracted debts,⁷⁰ did not rely on this clause of the Constitution for authority. The power to declare what should be legal tender was said to be a sovereign power, vested by necessary implication in Congress in connection with the powers over the currency expressly granted.⁷¹ It was held that the legal-tender acts do not prevent the States, in the exercise of their own sovereignty, from determining in what money they will collect their

68. Pomeroy, Sec. 408.

69. The Mint of the United States was established in 1792 at Philadelphia, where it has since remained. There are branch Mints in North Carolina, Georgia, Louisiana, Colorado, Nevada, and California.

70. Legal Tender Cases, 12 Wall. 457.

71. Legal Tender Cases, 110 U. S. 421.

taxes,⁷² nor to prevent private parties from stipulating in their contracts in what currency they shall be discharged.⁷³

Weights and Measures.—Thus far Congress has not seen fit to fix, in an authoritative manner the standard of weights and measures. This has been left to the States. In 1873, however, an act was passed making it lawful to employ the weights and measures of the metric system throughout the United States. Congress has also established a uniform troy pound for the regulation of the coinage, and defined and established the units of electrical measure. (Act of July 12, 1894.)

Clause 6.—To provide for the punishment of counterfeiting the securities and current coin of the United States.

Power to Punish Counterfeiting.—Under the authority here conferred, Congress may punish the counterfeiting of the notes and coin of the United States; and, since the grant of a greater power includes the less, it may also provide a punishment for passing counterfeit money, or having it in possession with intent to pass it, or bringing it into the United States with that intent.⁷⁴ Congress has accordingly, by severe laws, sought to prevent the making and circulation of counterfeit money. The States may also provide a punishment for circulating counterfeit coin of the United States within their limits, for the reason that they have the right to punish for the fraud and wrong done by one who knowingly imposes on his fellow-citizens with false and worthless imitations of money.⁷⁵

Clause 7.—To establish post-offices and post-roads.

Post-offices and Post-roads.—The words of this grant were poorly chosen to express the wide range of power which, by common consent, Congress has seen fit to exercise. This power

72. *Lane County v. Oregon*, 7 Wall. 71.

73. *Bronson v. Rodes*, 7 Wall. 229.

74. *U. S. v. Marigold*, 9 How. 559.

75. *State v. Brown*, 2 Or. 221.

includes the organization of the Post-office Department, the appointment of its many officers, the location of post-offices, the renting, buying, or building of houses to provide suitable accommodation for such offices, the designation of the routes over which the mail shall be carried, the making of all contracts for the transportation of the mails, the purchase of all supplies needed for the business of the Department, the manufacture of stamps and stamped envelopes, and the definition and punishment of crimes which tend to destroy the efficiency of the service or endanger the security of the mails. "To establish post-roads" has been interpreted in a few cases as furnishing authority for laying out and constructing roads for the carrying of mails, though it has generally been limited to the selection of existing routes. Congress has by law designated the post-roads of the United States.⁷⁶ All railroads which are now or may be hereafter in operation are included. Under its authority to control the mails, Congress has declared certain matter to be unmailable, including papers and advertisements relating to lotteries, obscene or indecent matter, and matter sent for the purpose of defrauding.

The Post-office Department has grown to enormous proportions, and produces annually an immense revenue. There have been but few years, however, in which its income has equalled its expenditures. Congress makes up the deficit by appropriations. The Department is under the charge of the Postmaster-General, who is a member of the President's Cabinet. His authority over the ordinary workings of the Department is complete, and extends to the appointment of all postmasters whose annual commissions are less than one thousand dollars.

Clause 8.—To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

76. Rev. St. U. S., 3964.

General Rule of Property in Products of Intellectual Labor.—The prevailing doctrine in regard to proprietary rights in the products of intellectual labor is that everyone has a natural right to and dominion over his own ideas and the fruits of his brain-work; he may keep them to himself or impart them to others at his option; but when once voluntarily published by him, in the absence of statutory provisions for their protection, they are beyond his control, and become the property of the public, equally available to all. Hence, for the purpose of promoting science, encouraging literature, and stimulating inventions, Congress has enacted certain laws by which the natural rights of authors and inventors are protected, and the public, at the same time, profited by their genius.⁷⁷ These are the copyright and patent laws of the United States.

Copyrights.—A copyright is an exclusive privilege, secured according to law, of printing or otherwise multiplying and vending copies of a certain artistic or literary production. In the case of a dramatic composition, it includes the right of publicly performing or representing it, or causing it to be performed or represented by others. And authors or their assigns have the exclusive right to dramatize any of their works for which, under the laws of the United States, they have obtained a copyright.

Copyrights are granted for the term of twenty-eight years from the time of recording the title thereof, as required by law. The right of renewal, upon complying with prescribed regulations, for a further period of fourteen years, is granted to the author, inventor, or designer, or to his widow or children if he be not living, at the expiration of the first period.

Patents.—As used here, a patent is an instrument, secured according to law, by which the United States secures to an inventor for a limited time the exclusive right to his own productions.

^{77.} Smith, Personal Property, 71.

Under the laws of the United States the following are the essential elements of a patentable production:

1. The alleged invention must be new, "not known or used by others in this country."

2. It must possess utility. Inventions of a mischievous or immoral nature, and such as are wholly useless, are not patentable; but the degree of utility is not important.

3. The invention must not have been known or used by others in this country. The applicant must be, therefore, not only an original, but the first inventor. If there should be more than one original inventor, the first to reduce the invention to a practical working condition is entitled to the patent.

4. The alleged invention must not have been "patented or described in any printed publication in this or any foreign country *before his invention or discovery* thereof" (not before his *application* for a patent), "and not in public use or on sale for more than two years prior to his application, unless the same is proved to be abandoned." That is, if his invention has not been in public use or on sale for more than two years, and if it is not shown that during this time he intended to abandon it, the other conditions being satisfied, the applicant is entitled to a patent.

A patent is granted for a period of seventeen years, and may, under prescribed conditions, be extended for a further period of seven years.

Clause 9.—To constitute tribunals inferior to the Supreme Court.

The system of courts established by Congress for the United States will be discussed under Article III. (See page 157 *et seq.*)

Clause 10.—To define and punish piracies and felonies, committed on the high seas, and offenses against the law of nations.

Piracies and Felonies.—In international law piracy is defined as “robbery or forcible depredation on the high seas, committed without lawful authority, and done *animo furandi*, and in the spirit of universal hostility.”⁷⁸ But it is to be noted that Congress is given authority to enlarge the scope of this crime, and, therefore, piracy according to international law may mean one thing, and piracy as defined by the statutes of the United States another. Congress has accordingly declared that piracy shall consist of the crime of piracy as defined by the law of nations, and such particular acts as robbery on the high seas or on shore by the crew of a piratical vessel, murder on the high seas, and the slave trade.⁷⁹ Great Britain and other countries have also declared the slave trade piracy, but it is not piracy at international law.⁸⁰

Felony is a term of loose signification. At common law it includes any crime which is punishable by death or forfeiture of lands and goods. As to the punishment of felonies committed on the high seas, it may be remarked that since Congress may exercise an exclusive control over the foreign commerce of the country, it is both proper and necessary that it should have jurisdiction over crimes committed on the highway of that commerce. By ‘high seas’ is meant the uninclosed waters of the ocean beyond low-water mark.

Offenses Against the Law of Nations.—Congress is also given authority to define and punish offenses against the law of nations—that is, the law by which independent nations agree to be governed in their intercourse with each other. Illustrations of the exercise of this power are to be found in the “neutrality laws,” which forbid the fitting out and equipping of armed vessels or the enlisting of troops for either of two belligerent powers with which the United States is at peace; and again, in the laws

78. Kent.

79. Rev. St. U. S., 5368-5382.

80. The *Antelope*, 10 Wheat. 66.

which prohibit the organizing within the country of armed expeditions against friendly nations.⁸¹

Clause 11.—To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

War.—In examining the war powers of the United States it will be found that the framers of the Constitution were careful to distribute them and to place such checks upon their exercise as would effectually guard against the creation of a strong military government and the consequent danger to the liberties of the people. The first of these powers, that of “declaring war,” was vested in Congress. In most of the European monarchies the king or other sovereign declares war, but in Great Britain this power is limited in its importance and possible application by the fact that Parliament alone has the power to raise and maintain armies and navies—the control of the purse.

War has been defined as “that state in which a nation prosecutes its right by force.”⁸² Hostilities against a foreign nation are usually inaugurated by a formal declaration of war, but war may be commenced, prosecuted, and terminated without any such declaration by either of the belligerents. In such a case Congress may recognize the existence of actual hostilities and declare that a state of war in fact exists. This happened in the case of our war with Mexico. During the rebellion a state of war was recognized by all the departments of the Government as existing, but there was no declaration of war and no formal declaration by Congress that a state of war in fact existed. The power to declare war necessarily includes the authority to prosecute the war and make it effective by all and any means and in every manner known to and exercised by any independent nation under the rules and laws of war, as the same are ascer-

81. Pomeroy, Const. Law, Sec. 423.

82. The Prize Cases, 2 Black, 635, 666.

tained by the principles of international law.⁸³ When war exists, the Government possesses and may exercise all those extreme powers which any sovereignty can wield under the rules of war recognized by the civilized world; and among these is the power to acquire territory, either by conquest or by treaty,⁸⁴ to create military commissions for the trial of military and other offenses in districts where the civil law is displaced by warlike operations,⁸⁵ and to establish provisional courts in conquered territory.⁸⁶ But there is and can be no power to displace the guarantees and protections of the Constitution when the civil courts are discharging their functions and can enforce them.

Letters of Marque and Reprisal.—A letter of marque is a commission given to a private ship by a government to make reprisals on the ships of another government. The power to declare war includes the power to grant letters of marque and reprisal, but this latter power was granted specifically, because it is sometimes resorted to in an effort to obtain redress where a nation has been injured in its own right or that of its subjects, without a resort to further hostilities.

Rules Concerning Captures.—Under this authority Congress may make rules concerning the disposition of all things taken; seized, or captured by the national forces. It may enact statutes providing for the disposition of enemies' or neutral ships and goods taken at sea, of public and private property of the enemy taken on land, and of the persons of enemies taken prisoners. As a legitimate means of prosecuting the war the property of a belligerent may be seized, confiscated, and disposed of absolutely at the will of the captor; but, until rules are made concerning captures and confiscations, no private citizen can

83. *Brown v. U. S.*, 8 Cranch, 110.

84. *American Insurance Co. v. Canter*, 1 Pet. 511.

85. *Miller v. U. S.*, 11 Wall. 268.

86. *Brown v. U. S.*, 8 Cranch, 110.

enforce rights of forfeiture, either with or without judicial assistance.

Clause 12.—To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

The Army.—The Constitution makes the President commander-in-chief of the Army, but he cannot maintain a large standing army without the consent of Congress, for to that body is given the power to raise and support armies. But Congress even appears to be not wholly trusted, for no appropriation of money to that use shall be for a longer period than two years. The power, therefore, remains in the people at every change in the House of Representatives to dictate the policy of the Government in regard to the Army and its maintenance. Appropriations are actually made for one year only.

The means or methods of raising armies are not prescribed, and the natural inference is that Congress may resort to any means of raising troops which the exigencies of the case may require. Congress may provide for the voluntary enlistment of men into the regular Army of the United States, without regard to age or qualification, prescribing their term of service, and all other matters relating to the duties and engagement of the enlisted man;⁸⁷ it may offer bounties or pensions by way of inducement to enter the military service; and, when other means prove insufficient, it may undoubtedly resort to a conscription or draft. Under existing laws the enlistment of able-bodied men between the ages of sixteen and thirty-five is authorized; but no minor shall be mustered into the service of the United States without the written consent of his parents or guardians, provided he has such who are entitled to his custody and control. And the Army Regulations, at present in force, prohibit the enlistment of minors under the age of eighteen.

87. *In re Grimley*, 137 U. S. 147.

The power to raise armies includes the right to determine the size of the regular Army, which is a permanent establishment, maintained both in peace and war; the apportionment of officers and men to the different arms of the same; and all the details of their organization into the different divisions of military command. It also includes the right to determine when volunteer armies shall be raised, the methods and terms of their enlistment, and all the details of their organization and service.

The power to "support" is also general in its terms. It furnishes authority for the appropriation of money by Congress for the pay, transportation, rations, and clothing of troops; the purchase or manufacture of arms or ammunition; the maintenance of a medical corps, and the building and support of hospitals; the construction and maintenance of forts, arsenals, barracks, and fortifications of all kinds; the establishment and maintenance of schools for officers or those who are destined to become officers; and, finally, for the creation and maintenance of the Department of War, with all its officers and clerks and its varied and important duties and functions.

Clause 13.—To provide and maintain a Navy.

The Navy.—In general, the remarks made under the power to raise and support armies apply with equal force here, except that the power to provide and maintain a Navy is not limited by any restriction as to the length of time for which appropriations for that purpose may be made. Congress may determine the number, kind, and cost of the vessels that are to be built for the Navy; the number of and method of raising its enlisted force; the number, rank, and duties of its officers; and may provide for all the incidents of its maintenance as occasion may require and as it may deem fit and proper. Under the authority of this clause the Navy Department, with its bureaus, has been created and maintained, and the Naval Academy established at Annapolis for the training of those who are to become officers.

The law relating to enlistments provides that minors between the age of fourteen and eighteen years cannot be enlisted without the consent of their parents or guardians.

Clause 14.—To make rules for the government and regulation of the land and naval forces.

Government of Land and Naval Forces.—The power here conferred upon Congress gives it the authority to ordain and establish military law—that is, a system of rules and regulations for the government of the Army and Navy. It includes the power to define offenses against military law and against the good order and discipline of the forces; to provide for the trial of such offenses by court-martial, and to prescribe the punishment to be inflicted. Proceedings in such courts are entirely criminal in their nature, but they are not required to be commenced by indictment; for, as will be seen, the Fifth Amendment to the Constitution excepts from its provisions “cases arising in the land and naval forces, or in the Militia, when in actual service.”

Clause 15.—To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

Clause 16.—To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress.

The Militia.—The language of the first of the above clauses is to be noted. The authority here conferred is not “to call,” but “to provide for calling” forth the militia. Congress may, therefore, pass general laws applicable to general circumstances which may arise in the future, and may therein empower the

Executive—and perhaps any other designated individual—to call the militia into the service of the United States upon the happening of one of the three contingencies contemplated by the Constitution. Such a law was passed in 1795 and is still in force. It is at present supplemented by the Act of January 21, 1903. Under the provisions of these laws the President is empowered, upon the occurrence of certain specified exigencies, such as invasion, insurrection, etc., to call forth such number of the militia as he may see fit, for a period not exceeding nine months, and to issue his orders to such officers of the militia as he may think proper. By the Act of 1903 the militia is made to consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age. It is divided into two classes—the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designation as may be given them by the laws of the respective States or Territories, and the remainder to be known as the reserve militia.

It will be observed that the Constitution does not speak of a national militia, but recognizes the militia as belonging to the separate States. When called into the actual service of the United States, however, it becomes national in its character—a part of the forces of the Federal Government—but even in this case the States retain the appointment of the officers. These officers are, however, subject not only to the orders of the President as Commander-in-chief, but also to those of any officer outranking their own who may, under the authority of the President, be placed over them. The militia cannot be called out to do service beyond the limits of the United States, for the laws of the Union can be executed only on its own soil, and there can be no insurrection or invasion beyond those limits. The President alone is to decide when an exigency exists which ju

calling out the militia, and his decision cannot be questioned by any other authority.⁸⁸ If a militia-man neglects or refuses to obey the call of the President, he may be tried and punished by a court-martial convened by authority of the United States, but it must be composed of militia officers only. He may also be tried by a State court-martial and punished according to State laws,⁸⁹ and, even if punished by both authorities, he cannot object on the ground of being twice tried and punished for the same offense. If Congress neglects to prescribe a discipline for the militia, the separate States may adopt a system of their own.

Clause 17.—To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places, purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

Seat of Government.—The cession of territory for the seat of Government, controlled by this clause, was made by Maryland and Virginia, and the national capital was removed from Philadelphia to Washington in 1800. This tract of land is known as the District of Columbia. That part of it granted by Virginia was retroceded to that State, and the present District, about seventy square miles, lies wholly within the exterior boundaries of the original State of Maryland. Congress acts as the local Legislature of the District, and appropriates half the money necessary for its government, the other half being assessed upon its taxable property. Its government is administered by a board of three Commissioners, two appointed by the

88. *Martin v. Mott*, 12 Wheat. 19

89. *Houston v. Moore*, 5 Wheat. 1; *Pomeroy Const. Law*, Secs 475 and 420.

President and Senate for the term of three years, and the third, an officer of the Engineer Corps of the Army, detailed by the President. The power of "exclusive legislation" includes the power to tax, and taxes levied are not required to be limited to the needs of the local government. Any direct tax levied by Congress may be extended to the District and the Territories according to their population.⁹⁰

Forts, Arsenals, Etc.—Land within a State may be acquired by the general Government in one of four ways:

1. By purchase with the consent of the legislature of the State in which the land may be located.
2. By purchase without such consent.
3. By an exercise of the right of eminent domain.⁹¹
4. By cession by the States.

In the first case, the United States obtains exclusive jurisdiction over the tract so acquired; in the second and third, the exclusive jurisdiction of the United States is limited to the land and buildings used for the public purposes of the general Government; in the fourth, the cession may be made with such limitations as to jurisdiction as may be agreed upon by the State and the Federal Government, except as indicated below. In the first case the State cannot take cognizance of acts done in such places, and the inhabitants thereof cease to be inhabitants of the State, and can no longer exercise any civil or political rights under its laws. In the second and third cases the jurisdiction of the States is not excluded over territory held or acquired by the United States within their limits, but without their consent;⁹² provided, of course, they do not attempt to exercise their jurisdiction so as to interfere with the public purposes for which the land was acquired. In the fourth case a State, in ceding jurisdiction to the general Government over a tract of land within i s

90. *Loughborough v. Blake*, 5 Wheat. 317.

91. *Kohl v. U. S.*, 91 U. S. 367.

92. *People v. Godfrey*, 17 Johns, N. Y. 225.

limits, may prescribe conditions to the cession, if they are not inconsistent with the effective use of the property for the purposes intended. It may, for instance, reserve the right to tax private property, or to serve civil or criminal process within the limits of the ceded territory, and the acceptance of the grant, without dissent by the United States, will imply its consent to the reservations.⁹³

Clause 18.—And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

General Powers of Congress.—Authorities on constitutional law are generally agreed that Congress would have had authority to enact all needful legislation to carry into effect the powers vested by the Constitution in the general Government, even though this clause had not been inserted. "It may be affirmed," says Hamilton, "with perfect confidence, that the constitutional operation of the Government would be precisely the same if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government and vesting it with certain specified powers."⁹⁴

Without this clause the legislation of the Government, necessary to give force and effect to its express powers, would have rested on implied authority in the same manner and to the same extent that the purchase of Louisiana and other territory, the annexation of Texas, the acquisition of Porto Rico and the Philippines, the grant of lands for railroads and canals, and many

93. *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525.

94. *Federalist*, No. 33.

other acts of the Government now rest upon authority necessarily implied from certain express grants by the Constitution.

Section 9, Clause 1.—The migration or importation of such persons as any of the States, now existing, shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

Express Prohibitions. Slavery.—At the time of the adoption of the Constitution slavery is said to have existed in some form in all the States except one, Massachusetts, in which it had been judicially held that a provision of its Constitution was inconsistent with the status of slavery, and therefore entitled every man to his freedom.⁹⁵ In a majority of the States further importation of slaves had been forbidden, but in three, at least, it was still allowed; and it was the unwillingness of these States to give the Federal Government either the express or implied power to cause the immediate discontinuance of the practice that led to this compromise clause of the Constitution. In 1807 an act was passed prohibiting the importation of slaves into the United States after January 1, 1808. The penalties provided by this act not proving sufficient to end the traffic, another was passed in 1820, declaring the slave trade piracy and punishing those engaged in it with death. Although servitude and the slave trade are several times referred to in more euphemistic terms, it is a significant fact that the word "slave" or "slavery" does not appear in the Constitution.

Clause 2.—The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

The Writ of Habeas Corpus.—The words *habeas corpus* mean "that you have the body." The writ of *habeas corpus* is

^{95.} Bancroft's History of U. S., Vol. X., p. 365.

defined as "a high prerogative writ, summary in its character directed to a person detaining another, commanding him to produce the body of the person detained at a certain time and place, with the time and cause of the caption and detention, and to do, submit to, and receive whatsoever the court or judge awarding the writ shall determine in that behalf."⁹⁶ The object of the writ is to free from illegal restraint, and the inquiry, therefore, is always directed to the legality of the restraint alleged in the application, and not to the question of guilt or innocence. The writ will not issue unless the application therefor shows a *prima facie* case of illegal detention. When, however, it appears that there is probable ground for discharge, the writ issues and is given to an officer to deliver to the person causing the restraint. The certificate of this officer is sufficient evidence of service. The person to whom the writ is addressed is required to make an answer in writing, showing the time and cause of the caption and detention of the prisoner, and to produce him before the court or judge, or give the reason for failing to produce him. This is called the return to the writ. The writ cannot, of course, run beyond the jurisdiction of the court or judge issuing it, but it has at times been issued to a person within the jurisdiction to cause him to produce the body of a prisoner deprived of his liberty beyond the jurisdiction.⁹⁷ The question of jurisdiction, including that of courts-martial, is always open to investigation by the proper courts on the writ of *habeas corpus*. And a judgment of conviction when so assailed is not good, unless it was rendered by a competent tribunal or court of competent jurisdiction, and unless there was power to render the particular judgment, as well as jurisdiction of the person, place, and subject-matter. But mere errors or irregularities, so long as they do not affect the jurisdiction, cannot be reviewed on this writ.⁹⁸

96. *Ex parte Watkins*, 3 Pet. 193.

97. *Church, Habeas Corpus*, Sec. 109.

98. *In re Lane*, 135 U. S. 443.

State and Federal Jurisdiction to Issue.—Both State and Federal courts and judges have power to issue the writ within their appropriate jurisdictions. But, owing to our duplex form of Government, it sometimes happens that there is a concurrent jurisdiction over the same persons and things, and the rule is that the officer who first gets possession under process from his court has the preference. In this case, if a person be imprisoned under a civil or criminal process of one power, the other cannot take him from such custody by writ of *habeas corpus* or other process for any purpose whatever. But a Federal court can issue the writ to procure the presence in court of a person held under State authority when he is wanted to testify. It was at one time contended that the States had jurisdiction to inquire into the cause of restraint of any person deprived of his liberty within their borders, whether by Federal authority or not; but it is now the settled decision that when, on *habeas corpus*, the State court or judge is judicially apprised that the party is in custody under the authority of the United States, they can proceed no further.⁹⁹ The power of the United States courts to issue the writ is subject to the following limitations: “The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or a law or treaty of the United States, or, being a citizen or subject of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend

99. *Ableman v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397.

upon the law of nations, or unless it be necessary to bring the prisoner into court to testify.”¹⁰⁰

Suspension of the Writ.—The Constitution gives authority for the suspension of the privilege of the writ only, and not the writ itself. In a proper case, therefore, the writ issues as a matter of course, and the court or judge decides on the return whether or not the party is entitled to proceed further. It seems now to be the generally accepted opinion that the power of suspension conferred by the Constitution is legislative in its character, and that Congress can alone exercise it. That body is to judge when an exigency exists which justifies this step, and it does not belong to the Executive either to so judge or to take the responsibility of suspending the writ unless under an authorization from Congress.¹⁰¹

The privilege of the writ is not usually suspended except when martial law has been declared in a particular place or district. The effect of its suspension is to make it possible for military commanders or other officers to cause the arrest and detention of obnoxious or suspected persons without any regular process of law, and to deprive those persons of the right to an immediate hearing and to be discharged if the cause of their arrest is found to be unwarranted by law.¹⁰² Some writers make the statement that the writ has at times been suspended by certain military commanders, but this is not correct. “In times of war a military commander may declare and enforce martial law, and may justifiably disregard a writ of *habeas corpus* when obedience to it would necessarily interrupt and hinder him in the discharge of important military duties; yet this kind of justifiable disregard of the writ, growing out of the existence of martial law, or local and temporary necessities of

100. Rev. St. U. S., Secs. 751-753.

101. *McCall v. McDowell*, 1 Abb. U. S. 212.

102. Black, Const. Law, p. 600.

military duty, does not amount to the suspension of the writ contemplated by the Constitution."

Nothing in this provision hinders the States from suspending the privilege of the writ issuing from their own courts.

Clause 3—No bill of attainder, or *ex post facto* law, shall be passed.

Bills of Attainder.—A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is called a bill of pains and penalties. In these cases the legislative body exercises the powers and office of judge; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense. These bills are generally directed against individuals by name, but they may be directed against a whole class. They may inflict punishment absolutely or conditionally.¹⁰³ Until very recently the British Parliament exercised the power of passing these laws, and, prior to the adoption of the Constitution, the legislatures of the then existing States made use of them in many cases. They were chiefly directed against those Americans who had remained loyal to the British Crown after the revolt of the Colonies.¹⁰⁴ The power to pass such laws could seldom be productive of good and might often be abused. It was, therefore, wisely denied to both the State and Federal Governments.

103. *Ex parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, 4 Wall. 277.

104. *Cooper v. Telfair*, 4 Dall. 14.

Ex Post Facto Laws.—The term *ex post facto* is a technical one, and applies only to penal and criminal proceedings. An *ex post facto* law is one

- (a) Which makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; or
- (b) Which aggravates a crime, or makes it greater than it was when committed; or
- (c) Which changes the punishment and inflicts a greater punishment than the law annexed to the crime when it was committed; or
- (d) Which alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.¹⁰⁵

To the above may be added laws which deprive persons accused of crime of some lawful protection to which they have become entitled, such as the protection of a former conviction or acquittal, or of a proclamation of amnesty.¹⁰⁶

But a law is not *ex post facto* which changes the punishment by mitigating it, or which changes the practice in criminal cases, still preserving to the defendant his substantial rights; or which enlarges the class of persons who may testify;¹⁰⁷ or which limits the number of peremptory challenges to jurors; or which, in providing for the trial of such offenses as may be committed in the future, permits the punishment to be increased on proof of previous convictions, though the previous convictions took place before the law. It is the subsequent offense only that is punished in such a case, and it was committed with constructive if not actual, notice of what the punishment might be. And a

105. *Calder v. Bull*, 3 Dall. 385.

106. *State v. Keith*, 63 N. C. 140.

107. *Hopt v. Utah*, 110 U. S. 574.

person may be extradited under a treaty though he had obtained asylum in the country before the treaty was made.¹⁰⁸

An *ex post facto* law is necessarily, as the words imply, a retroactive law. But all retroactive laws are not *ex post facto*. The term is limited to penal and criminal proceedings which affect life and liberty, or may impose punishments or forfeitures.

Clause 4.—No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

Direct Taxes.—A capitation or poll tax has already been defined (*ante*, page 77). It will be recalled that the manner of levying direct taxes and apportioning representatives among the several States was prescribed in Article I., Section 2. The method of determining the respective numbers of the States there prescribed was changed by the Fourteenth Amendment, but otherwise the method of laying direct taxes as first stated, and as emphasized in the clause under discussion, remains unchanged.

Clause 5.—No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties, in another.

Federal Duties on Exports.—The clause which declares that “no tax or duty shall be laid on articles exported from any State” has always been considered as expressly prohibiting all taxes and duties on exports as such. An export duty must be the counterpart of an import duty. A tax in the form of an excise upon internal articles of growth or manufacture, while they are internal, is not, therefore, forbidden, even though the principal or sole use to which these articles are put in the trade

108. *In re Giacomo*, 12 Blatch. 391.

of the country is to export them. A small fee for a stamp, required to be placed upon tobacco sent out of a State, is not a tax within this clause.¹⁰⁹ The taxing of exports was recognized as likely to impose unequal burdens upon the industries of the country and upon the different sections thereof. It was therefore forbidden.

No Preference Given to Ports of One State over Another.—This clause is plain, simple, and just, and requires no comment, further than to state that it was doubtless inspired by the memory of the harassing restrictions placed upon the commerce of the Colonies when ships sailing therefrom for Europe were required to enter and clear from some British port.¹¹⁰

Clause 6.—No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

Appropriations.—In discussing this provision Cooley remarks that it “applies with peculiar force to the President, and is a proper security against the Executive assuming unconstitutional powers. The further provision that periodical statements of receipts and expenditures shall be published is intended as a means of holding all departments of the Government, and particularly the legislature, under a due sense of responsibility to the people. The duty to see to this publication is properly executive.”¹¹¹ And Pomeroy adds: “It is, indeed, the very keystone which holds together the arch of constitutional powers and limitations. Withdraw this and all others would become mere words, with no force or efficacy. How far would an ambitious President be restrained from the accomplishment of

109. *Pace v. Burgess*, 92 U. S. 372.

110. This clause was somewhat considered in the *Wheeling Bridge Case*, 18 How. 421.

111. Cooley, *Prin. Const. Law*, p. 109.

his designs by the clause forbidding appropriations for the Army for more than two years, if he might draw money from the Treasury without appropriation? This single example is enough to illustrate the importance of the provision in question. There could be no safety without it, and the security of the whole governmental fabric depends upon its strict and literal observance by all officers and departments of the administration.'¹¹²

Clause 7.—No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

Titles of Nobility, Etc.—The granting of titles of nobility is here prohibited to the Federal Government, and in the next succeeding clause it is also prohibited, as will be seen, to the separate States. Thus both Governments are prevented from introducing anti-republican features into American institutions. As to the prohibition against the acceptance by Federal officers of presents, emoluments, offices, or titles, from any king, prince, or foreign State, it may be remarked that a wise jealousy of foreign influence in the affairs of government amply justifies this provision.

Section 10, Clause 1.—No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Limitations on State Powers.—In considering the explicit limitations on the power of the States it will be seen, in

112. Pomeroy, Const. Law, pp. 348-349.

some cases, that these are identical with limitations laid upon the power of Congress; while in others, certain things are forbidden to the States which Congress may do under either an express or implied grant of authority.

Treaties, Alliances, Etc.—In the first place, the States are forbidden to enter into any treaty, alliance, or confederation. It has been seen that the Federal is the only Government in the United States that is truly sovereign, and that it is given by the Constitution full and exclusive control over all our foreign relations and all our dealings as a nation among nations. It will be seen later that the Constitution declares treaties made by the United States to be a part of the supreme law of the land, and it will appear, on a full consideration, that the States are not only forbidden to form alliances or arrange treaty rights with foreign countries, but that they are not at liberty to disregard or obstruct those made by the national Government. The clause of the Constitution following the one now under consideration will show us that “no State shall, without the consent of Congress, . . . enter into any agreement or compact with another State or with a foreign power.” It is evident from the use of the words “treaty,” “alliance,” “confederation,” “compact,” and “agreement” that the framers of the Constitution desired and intended to cut off all connection or communication between a State and a foreign power, and the Supreme Court has decided that, in order to execute this evident intention, the word “agreement” must receive its most extended signification and be so applied as to prohibit every agreement, written or verbal, formal or informal, positive or implied by the mutual understanding of the parties.¹¹³ Thus, an act of a legislature of a State providing for the surrender of fugitives from justice claimed by a foreign power as offenders against its laws, though not strictly a treaty, involves relations with such foreign power,

113. *Holmes v. Jennison*, 14 Pet. 540.

and is, to that extent, an invasion of the paramount control of Congress over our foreign intercourse, and for that reason is void.¹¹⁴

But the States, with the consent of Congress, may make compacts with each other. This consent need not necessarily be manifested by an express assent to every proposition contained in the agreement, but may be inferred from the legislation of Congress on the subject.¹¹⁵ It is not fully settled whether or not the consent of Congress is necessary to every kind of contract which two States might make with each other; but it is probable that the prohibition against compacts and agreements between States does not extend to matters in which the Federal Government could have no possible interest or concern, which do not trench upon the national authority or the subjects committed to its exclusive control, nor involve the autonomy of any State, or the nature or extent of its political power or influence.¹¹⁶

The wisdom of denying to the States the powers above mentioned is evident. If the separate States could enter at will into treaties and alliances, national unity or harmony among the States would be impossible; and what the States cannot do in the Union they cannot do by attempting to withdraw from it.¹¹⁷

Letters of Marque and Reprisal.—This subject has been somewhat discussed under the war powers of Congress. It needs only to be remarked here that the removal of this power from the field of State action and the vesting of it exclusively in the general Government form a part of that wise, general policy which takes from the States, affected as they must always be by varying interests and local prejudices, the powers of peace and

114. *U. S. v. Rauscher*, 119 U. S. 407.

115. *Virginia v. W. Virginia*, 11 Wall. 39.

116. See *Virginia v. Tennessee*, 148 U. S. 503.

117. *Texas v. White*, 7 Wall. 700.

war, with all their concomitants. If it were not for this prohibition it would be in the power of any State, at any time, to involve the whole nation in war. The wisdom of this provision against the petulance or precipitation of a single State is, therefore, unquestioned.

Coining Money.—The evil that would result from allowing the States to coin money or regulate its value has already been referred to in discussing the money powers of Congress. Under the Articles of Confederation the several States possessed the power to coin money as well as the United States, and the disastrous results of this system were so well known that the Constitution not only expressly gave the power to coin money to Congress, but also expressly denied it to the States.

Bills of Credit. Legal Tender.—A bill of credit, such as the States are forbidden to emit, “must be issued by a State, on the faith of the State, and designed to circulate as money. It must be a paper which circulates on the credit of the State, and so received and used in the ordinary business of life.”¹¹⁸ Not every species of evidence of debt issued by a State, therefore, comes within the above definition of bills of credit. The term does not include bonds issued by a State, or warrants for payment of services out of a specific fund.

The States are also forbidden to make anything but gold and silver coin a tender in payment of debts. The history of paper currency during the Revolution, its serious depreciation, the attempts to maintain its credit by making it a legal tender in payment of debts, and the consequent public discredit, furnish the reason for the prohibition laid by the Constitution on the States in regard to the issue of bills of credit and the making of legal tender. But neither of these restrictions will prevent the States from granting charters of incorporation to banking companies and authorizing them to issue their bills, intended to cir-

¹¹⁸ *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Craig v. Missouri*, 4 Pet. 410.

culate as money, provided that such bills are issued upon the credit of the banks alone, and not upon the faith of the States, and that it is not attempted to give them the character of legal-tender notes. Bills issued by such a banking corporation, which has a paid-up capital and may be sued upon its debts, are not to be deemed bills of credit, even though the State owns the entire stock of the bank, and the legislature elects the directors, and the faith of the State is pledged for the redemption of the bills, and they are made receivable for all public dues.¹¹⁹

Bills of Attainder and Ex Post Facto Laws.—The power to enact bills of attainder and *ex post facto* laws is prohibited both to the several States and to the Federal Government. These subjects are sufficiently discussed under the prohibition to Congress. What is said there applies equally here, and need not be repeated.

Impairing the Obligation of Contracts.—This clause of the Constitution has given rise to a vast amount of litigation, and the decisions growing out of it are so numerous that it is a well-nigh impossible task to state in a brief and comprehensible form the points of law which they have established.¹²⁰ It is to be noted that this prohibition is directed against the States only, and that there is no other clause of the Constitution laying a like inhibition upon Congress. It follows, therefore, that if Congress, acting within its jurisdiction, should pass a law not obnoxious to any other prohibition of the Constitution, the courts would be obliged to sustain it, notwithstanding its effect might be to impair the obligation of existing public or private contracts. Such consequences have, indeed, attended several of the acts of Congress, such as the legal-tender laws and the

119. *Darrington v. Bank of Alabama*, 13 How. 12; *Briscoe v. Bank of Kentucky*, 11 Pet. 257.

120. I am greatly indebted to the excellent chapter on this subject in Black's "Constitutional Law," from which the matter here presented has been largely taken.

various statutes of bankruptcy, but their constitutionality has not been questioned on that ground.¹²¹

Definition of Obligation.—The obligation here referred to is that duty of performing the contract according to its terms and intent which the law recognizes and enforces. The prohibition against impairing the obligation of contracts applies not only to the laws enacted by the legislature of a State and the ordinances of its municipalities, but also to any clause in its Constitution, or any amendment thereto, which produces the forbidden effect. The Constitution is the supreme law of the land, and its prohibitions upon State action apply to the people of a State when making or amending their constitutions as much as to their legislatures in making ordinary laws.

When a Contract Is Impaired.—A law impairs the obligation of a contract and is void if it

- (a) Precludes a recovery for breach of the contract;
- (b) Excuses one of the parties from performing it;
- (c) Renders the contract invalid;
- (d) Puts new terms into the contract;
- (e) Enlarges or abridges the intention of the parties;
- (f) Postpones or accelerates the time for performance of the contract;
- (g) Interposes such obstacles to its enforcement as practically to annul it.

The extent of the change made in a contract is not material; any impairment is unlawful. "This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."¹²²

121. *Hepburn v. Griswold*, 8 Wall., 637; *Gunn v. Barry*, 15 Wall. 610.

122. *Planters' Bank v. Sharp*, 6 How. 301.

What Contracts Are Protected.—State legislatures are thus prohibited from impairing the obligation of

- (a) Agreements or compacts of the State with another State;
- (b) Contracts of the State with corporations or individuals;
- (c) Grants of property or franchises by the State;
- (d) Contracts between private persons.

The contracts thus protected from impairment do not include

- (a) Statutory grants of mere licenses or exemptions;
- (b) The tenure of public offices;
- (c) Illegal or immoral contracts;
- (d) Judgments of the courts;
- (e) The status created by marriage.

The protection furnished by this clause extends to executed as well as executory, to implied as well as express contracts.¹²³ It extends also to such agreements or compacts between two States as they may be authorized by the consent of Congress to make, and to contracts which arise from the operation or existence of statutes which make an engagement on the part of a State or provide remedies which enter into the composition of future contracts. Thus a law which offers a bounty for any particular kind of services to be rendered creates a binding contract when the terms are accepted by an individual and the work begun or the services rendered.

Contracts of a State with Individuals.—Bonds and other evidences of debt, including such provisions of law with regard to the receivability of the bonds or coupons for taxes or the exemption of the securities from taxation as existed when they came into the hands of the holders and were intended to promote their credit or their circulation, are in the nature of contracts with the lawful holders thereof, the obligation of which

123. *Holmes v. Holmes*, 4 Barb. 295.

State legislation must not impair. Thus where public securities are held by non-residents, who are not subject to taxation by the State, a subsequent statute taxing the securities and directing that the amount of the tax shall be deducted from the stipulated periodical payments impairs the obligation of the contract and is void.¹²⁴ And where a State issues bonds and provides that the coupons thereon shall be receivable in payment of taxes and debts to the State, the legislature cannot afterward rescind this privilege, even on the ground of fraud in the manipulation of the securities.¹²⁵

Grants by a State.—Grants of property or franchises made by a State to a private person or corporation are contracts within the meaning of this clause of the Constitution. The State of Georgia sold land to certain individuals and issued a patent therefor. Later a statute was passed annulling the grant and setting aside the patent on the ground of fraud and misrepresentation on the part of the purchasers. The Supreme Court held this statute void, as impairing the obligation of the contract.

The legislature of a State, acting for the public interests, may grant to a person or corporation a monopoly or exclusive franchise or privilege, and the grant may assume the form of a contract, the obligation of which must not thereafter be impaired; but

- (a) Nothing will pass by implication, and the grant will not be enlarged by inference or construction. It is to be construed strictly against the grantee and in favor of the public;¹²⁶
- (b) It is always presumed that a legislature *did not* intend to grant a monopoly, and this presumption can be overcome only by clear and satisfactory inferences from the terms of the grant;

124. State Tax on Foreign-held Bonds, 15 Wall. 300.

125. Virginia Coupon Cases, 114 U. S. 270.

126. Charles River Bridge v. Warren Bridge, 11 Pet. 420.

- (c) The rights granted may be annulled by the State in the exercise of the power of eminent domain, or their value may be impaired by the grant of similar privileges to others; but in this case due compensation must be made;
- (d) The use of property or the enjoyment of a privilege may be regulated by a State in the valid exercise of its police power, even though the value of the property or privilege may thereby be impaired.

Licenses and Exemptions.—A license is a permission granted to an individual to do some act or engage in some occupation which without such permission would be unlawful. It is not a contract. For instance, licenses to sell intoxicating liquors, or to maintain a lottery, or to foreign insurance companies to do business within a State, are not contracts, and a change in the law may nullify them or hedge them about with more severe restrictions.¹²⁷ And similarly, mere exemptions, such as from jury duty, from serving in the Army, and from the duty of working on the public roads, are mere gratuities to the citizens, and may be changed or done away with at the will of the legislature.

Office.—The election or appointment of a public officer and his acceptance of the office do not constitute a contract between the State or municipality and himself. Unless protected in his office or salary by the Constitution, the office may be abolished or its emoluments and duties changed whenever the legislature sees fit.

Illegal and Immoral Contracts.—If the consideration on which a contract is based is illegal, contrary to public policy, or immoral, it has no legal obligation entitled to protection or respect. But, if the consideration was lawful and sufficient at the

^{127.} *Calder v. Kurby*, 5 Gray, 597; *Stone v. Mississippi*, 101 U. S. 814; *Home Ins. Co. v. City Council of Augusta*, 93 U. S. 116.

time the contract was entered into, changes in the law or public sentiment will not suffice to render the contract unenforceable.

Judgments. Marriage. — A judgment rendered by a court is not a contract within this prohibition. Laws which operated to vacate judgments have been declared invalid, as obnoxious to this provision; but it was not because they attacked the judgment, but because they destroyed the remedy on the original contract, which is vital to the maintenance of its obligation.¹²⁸

Neither is marriage a contract within this clause. While it contains contractual elements, it is properly to be regarded as an institution of society. It establishes a status of the married parties which is not dissoluble at their pleasure, and is, therefore, more than a contract. For this reason divorces granted directly by the legislature or by the courts, under the authority of a general law, cannot be said to impair the obligation of a contract.

Charters as Contracts.—The charter of a private corporation granted by the legislature of a State constitutes a contract between the State and the corporation, which, while it cannot be repealed, altered, or materially modified without the consent of the corporation, unless the power to do so has been reserved, will yet be strictly construed against it. But it is to be remembered that the franchises of a corporation may always be resumed by the State in the exercise of its power of eminent domain, and that their use and exercise may be regulated under the police power.

The charter of a municipal corporation is not a contract. It is rather to be regarded as a delegation of governmental powers for public purposes to a subordinate agency of the government. All rights, powers, privileges, and franchises granted to such a corporation are held subject to legislative modification or recall. But the legislature cannot constitutionally deprive municipal

128. *Garrison v. City of New York*, 21 Wall. 196.

corporations of the power of taxation so as to leave them without the means of raising money to pay existing debts, which were contracted when they possessed the power to levy taxes and on the faith of the continuance of such power.¹²⁹

Exemptions from Taxation.—It is competent for a State legislature to create an exemption from taxation in the form of a contract which subsequent legislation may not impair, but such a contract must be founded on a consideration moving to the public, and must be expressed in clear and unambiguous terms. It cannot be presumed, and where doubt exists, it will always be resolved against the exemption claimed.

Remedies.—The remedy for the enforcement of a contract is to be distinguished from its obligation. Whatever pertains merely to the remedy may be changed or modified at the will of the legislature, and the obligation of the contract will not be impaired so long as the remedy is not wholly taken away or so hampered or reduced in effectiveness as to render the contract practically unenforceable.

Limitations on Power of Legislature to Contract.—A State legislature, in making contracts with individuals or corporations, is always limited by the rule that it cannot relinquish any of the essential powers of sovereignty by an irrevocable bargain or grant. The police power of a State and its power of eminent domain will never be understood as surrendered by the State in any contract it may make. Any attempted surrender of these powers would be beyond the legislative authority, and void.¹³⁰

Clause 2.—No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and im-

129. *Von Hoffman v. City of Quincy*, 4 Wall. 535.

130. See 101 U. S. 814; 97 U. S. 25; 115 U. S. 650; 6 How. 507.

posts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

Imposts and Duties.—The purpose of the first of the above clauses was to more effectually invest the general Government with the entire control of foreign and inter-State commerce. State inspection laws were foreseen to be necessary and proper, and it was deemed advisable, in order to permit a proper execution of these, to allow the imposition of such fees on imports and exports as were found to be absolutely necessary. This concession was zealously guarded, however, and all temptation for the States to overstep the limits set for them was removed by the provision that the net proceeds of all such duties and impost shall be for the use of the Treasury of the United States.

An inspection law is one which provides for the inspection and approval of various kinds of merchandise, especially food, intended for exportation or for sale for domestic use, whether produced at home or imported from abroad. It has been decided that the word "imposts," as here used, refers only to such goods as are imported from foreign countries, and that it is not applicable to those merely sent from one State into another.¹³¹ But the power of the States to tax the latter class of goods is controlled by the power of Congress to regulate inter-State commerce. In regard to articles imported from foreign countries, it is held that they do not lose their character as imports, and be-

131. *Woodruff v. Parham*, 8 Wall. 123.

come subject to State taxation as a part of the general mass of property in the State, until the original package is broken up for use or for retail by the importer, or the commodity has passed from his hands into the hands of a purchaser.¹³² But it will be noticed that if goods are imported into State A and, leaving the hands of the importer before they have there become subject to taxation by the State, are put in transit to a purchaser in State B, they pass at once under the power of Congress to regulate inter-State commerce, and never become subject to taxation in State A. The moment they reach their destination in State B, however, they become a part of the general mass of property in the State, and may be there taxed as such. As to when goods, found within the limits of a State, are to be considered as exports, it has already been observed that goods raised or produced in a State are not to be considered as exports until they have been delivered to a common carrier for transportation to another State or to a foreign country, or have been started upon such transportation in a continuous route or journey;¹³³ and that goods sent into a State from without lose their character as exports the moment they reach their destination.

The State of Maryland enacted a law which required all importers of foreign goods to take out a license, for which they were compelled to pay a prescribed fee. The State of California enacted a law imposing a stamp on bills of lading of gold exported from that State. Both these laws were declared by the Supreme Court to be void: the one because it imposed what amounted to a duty on imports, and the other to a duty on exports; neither being claimed to be in aid of any measures that are included within the general description of inspection laws.¹³⁴

132. *Brown v. Maryland*, 12 Wheat. 419.

133. *Coe v. Errol*, 116 U. S. 517.

134. *Brown v. Maryland*, 12 Wheat. 419; *Almy v. California*, 24 How. 169.

Duties of Tonnage.—The tonnage of a vessel is the measure of its size and carrying capacity, estimated in tons of one hundred cubic feet each, and calculated, according to a rule prescribed by act of Congress. The Supreme Court has decided that, within the meaning of the Constitution, a duty of tonnage is one imposed upon a vessel according to its tonnage, as a charge for entering or leaving a port or navigating the public waters of the country. The prohibition as to duties of tonnage was designed to prevent the States from imposing hindrances of this kind to commerce carried on by vessels, and to prevent their interfering with foreign or inter-State commerce by the indirect method of taxation.¹³⁵

But it does not prevent a State from taxing the owners of vessels in respect to their property therein when the vessels are subject to its taxing power or have their home *situs* within its limits.¹³⁶ And a State statute requiring the payment of wharfage dues from vessels making fast to wharves and discharging cargo thereat is not objectionable as imposing a duty of tonnage, even though the charges are graduated according to the tonnage of the vessel.¹³⁷

Keeping Troops. Engaging in War.—These prohibitions must be considered in connection with the grants to Congress of power to declare war and to maintain armies and navies. The general purpose of the whole is to give the Federal Government the entire power of making war and maintaining a military establishment, and to remove from the States the power to engage in hostilities with each other or with foreign nations. But if a State should be actually invaded or in imminent danger thereof, it would undoubtedly be within its lawful power to raise an army to meet the emergency, without waiting for the consent of Congress. The word "troops," as used in this clause, refers

135. *Huse v. Glover*, 119 U. S. 543

136. *Peete v. Morgan*, 19 Wall. 581.

137. *Packet Co. v. Keokuk*, 95 U. S. 80.

to a standing army, and does not include the militia. This is shown by those parts of the Constitution which recognize the militia forces of the States, and by the Second Amendment, which declares that a well-regulated militia is necessary to the security of a free State.

Implied Limitations.—Having referred to the specific limitations imposed by the Constitution on the several States, it is proper to mention here that the implied limitation, which prevents the exercise by the Federal Government of its rightful powers in such a manner as to interfere with the constitutional functions and legitimate operations of the States, also serves to prevent State interference with legitimate Federal activities. It is to be observed, therefore, that the States cannot rightfully lay any tax upon the means, instruments, or agencies provided or selected by the United States to enable it to carry into execution its legitimate powers and functions. It is beyond the power of any State to impose a tax on any office of the Federal Government, or on the salary of its incumbents, or the property, means, or agencies employed by him to discharge his official duties, or on land held by the United States and lying within the State borders,¹³⁸ or on its ships of war or public institutions, or on the loans, money, and securities of the general Government, or on the national banks or their circulation. And it has been held that a State tax of a certain sum on every person leaving the State in a public conveyance is void, as tending to embarrass the functions of the national Government, by obstructing the travel of citizens and officers of the United States in the business of the Government and the transportation of armies and munitions of war.¹³⁹

138. *Van Brocklin v. Tennessee*, 117 U. S. 151; *Railway Co. v. McShane*, 22 Wall. 444.

139. *Crandall v. Nevada*, 6 Wall. 35.

In regard to the existing national banks, it is provided by an act of Congress that shares of stock in such banks may be taxed by the States; provided, however, that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such States, and that the shares of any national bank owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere.¹⁴⁰

140. Rev. St. U. S., Sec. 5219

CHAPTER V.

THE EXECUTIVE.—ARTICLE II. OF CONSTITUTION.

Section 1, Clause 1.—The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows.

The Executive.—It will be recalled that during the period preceding the adoption of the Constitution the Congress of the Confederation was the sole governing body of the United States, possessing in itself all the legislative, judicial, and executive functions which had been entrusted to the general Government. The total failure and the evils of this system were too well known to admit of any question as to the propriety of separating the executive from the legislative and judicial departments and giving it a distinct sphere of operation. The questions which actually arose were as to the nature of the executive, the length of term, and eligibility to re-election.

Some members of the Convention favored an executive to be composed of three persons, one to be chosen from each of the three great divisions of the country; but the lessons from history showed clearly that such an executive was apt to be characterized by weakness, inaction, and dissention. The Convention, therefore, adopted the idea of a single executive—a President—and, to prevent the anticipated danger that this one-man power should become too strong and tyrannical, sought to impose such limitations as would prevent usurpation and increase of power by the executive at the expense of the other departments of

government. The term of office was fixed at four years. This, it was thought, would keep the President sufficiently dependent on the people. Another provision makes him subject to removal from office on impeachment, and he was not made ineligible to re-election. Thus it will appear that if a President should prove unpopular, he may be dropped at the end of four years; if he should violate the laws or attempt to overthrow the Government, he may be removed from office by impeachment; but if he should prove desirable as a chief executive, he may be re-elected as many times as the people see fit. In actual practice, however, no President has ever served more than two terms.

Arguments for a Single Term.—There are many who contend that it would be better if the Constitution had made the President's term seven years instead of four, and had made him ineligible to re-election. It is claimed, with truth, that frequent elections disturb the business interests of the country, involve great expense and loss of time, and render the executive policy more or less uncertain; also that a single term would tend to secure a better and purer administration of the executive department, since it would remove the temptation to so shape governmental policies as to secure the re-election of a President, or perhaps the success of any particular party.

Clause 2.—Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Choice of Electors.—The Constitution leaves each State free to adopt its own method of choosing electors. The legislature may, therefore, decide to name them itself or to have them

chosen by popular vote in districts or on a general ticket.¹ At the present time the last-mentioned method is almost universally in vogue, and it is believed that in all the States the choice has been left to the people. The result of this is to insure in each State or election district the choice of electors who are of the same political faith as the majority of the voters, and who, under the existing system of party politics and party allegiance, are certain to correctly register in the Electoral College the wishes of this majority as to the choice of President and Vice-President.

The Qualifications of Electors.—The positive qualifications of electors are not prescribed, but certain negative qualifications are mentioned. No senator or representative, or person holding an office of trust or profit under the United States, can be an elector; and, by the third section of the Fourteenth Amendment, no person is eligible who has violated an oath, previously taken to support the Constitution of the United States, by engaging in insurrection or rebellion against the same, or giving aid or comfort to the enemies thereof, unless his disability has been removed by Congress.

Since the number of electors of any State is equal to the number of its senators and representatives, it has the same relative weight in the choice of President and Vice-President that it has in Congress.

Twelfth Amendment.—The method of choosing the President and Vice-President, as prescribed by Article II., Section 1, clause 3 of the Constitution, having been changed by the Twelfth Amendment, that amendment is here given in black letter type for study, and the original clause is given in a foot-note² for comparison and reference:

1. *McPherson v. Blacker*, 146 U. S. 1.

2. "The electors shall meet in their respective States, and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same State with themselves; and they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall

The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign, and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such a majority, then, from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But, in choosing the President,

sign and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President; but if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President."

the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of senators; a majority of the whole number shall be necessary to a choice.

But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.³

Changes.—Under the original clause each elector voted for two persons, without designating which was voted for as President and which as Vice-President. It was, therefore, possible for a candidate for the Presidency to be defeated for that office by a candidate for the Vice-Presidency. In case the election went to the House of Representatives, the Vice-President could not be chosen until the President had been chosen. A failure, therefore, in the choice for the first office would involve a failure for the second. The amendment avoids these conditions by providing that the electors shall vote for one person as President

3. Only twice has the choice of President devolved upon the House. Jefferson was elected over Burr in 1800, and John Quincy Adams over Andrew Jackson and other candidates in 1824. One Vice-President only has been chosen by the Senate—Richard M. Johnson, in 1836.

and for another as Vice-President; and that the Senate shall choose a Vice-President from the list of those voted for as such, in case no one has been chosen by the electoral vote. It is further provided that if a President is not chosen by the fourth of March, the Vice-President shall act as President. The amendment reduces the number of candidates from whom the choice of President may be made from five to three; it prescribes what shall be a quorum of the Senate for and the number of senators necessary to a choice of Vice-President; and provides in effect that the Vice-President must possess the same qualifications as are required for the President. Nowhere in the original Constitution are the qualifications of the Vice-President referred to.

Electoral Voting a Mere Form.—It was the intention of the framers of the Constitution to interpose a free-thinking and acting body of intelligent electors between the people and their choice of rulers. They appear not to have had sufficient faith in the intelligence of the people to trust them with the direct choice, and they designed that the electors should consider the merits of the candidates for the Presidency and cast their votes as, in their opinion, the best interests of the country required. With the development of parties and the machinery of party politics, however, the giving of the electoral vote has become a mere matter of form. Each elector now invariably casts his vote for the candidate of the party which elects him to office, and the choice of President is known as certainly as soon as the electors have been chosen as it is after their votes have been counted. "This complete change in the manner of electing the President is a remarkable instance of the way in which written laws and constitutions, however carefully guarded, may be made to yield to a change in the popular feelings and wishes; so that, while not a clause is repealed or modified, the effect of the whole is entirely transformed. On the letter of the Constitution there has grown up an unwritten law, not indeed enacted by courts, but devised

and voluntarily obeyed by those who manage the machinery of popular elections."⁴

A Minority May Elect.—It will be observed that, in the method prescribed for choosing the President, the people of the United States are not appealed to as one collective aggregate, but as segregated into their local commonwealths. It is, therefore, possible for a person to receive the ballots of a majority of the electors and become President, while a majority of the actual voters have preferred another candidate. Since the purpose and significance of the Electoral College have been lost sight of, and since under a republican form of government the majority should always control, it would seem that the idle and useless form of electoral voting might well be abandoned, and the people allowed to choose their President and Vice-President by direct vote.

Clause 4.—The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

Giving and Counting of Electoral Votes.—The following is a brief statement of the acts of Congress with regard to the choice of electors and the giving and counting of their votes:

By Act of 1845 it is provided that the electors shall be chosen in each State on the Tuesday next after the first Monday in November. By Act of 1887 it is made the duty of the Governor of each State, as soon as possible after the results of the election are known, to make a certificate to the effect that there has been, under the laws of the State, a proper ascertainment of the electors appointed and giving the names of the electors and the number of votes cast for each. He is required to transmit one copy of this certificate to the Secretary of State of the United States, and to deliver three copies to the electors of the State on

4. Pomeroy, *Const. Law*, p. 129.

or before the day of their meeting, all copies to be under the seal of the State. The electors are required to meet in each State and give their votes on the second Monday in January next following their election. They must make and sign three certificates of all the votes given by them and enclose with each of these one of the before-mentioned certificates required to be made by the Governor. The certificates are then sealed, and the electors certify on each that it contains a list of the votes of such State for President and Vice-President. They then appoint a person to take charge of and deliver one of these certificates to the President of the Senate at the seat of Government, while another is to be forwarded at once by the post-office to the same officer at the same place; the third they are required to deliver to the judge of the district in which they assembled.

Both Houses of Congress are required to meet in the hall of the House of Representatives at one o'clock in the afternoon of the second Wednesday in February following the meeting of the electors. The President of the Senate presides and opens, in alphabetical order of the States, the certificates of their electoral votes. Tellers, previously appointed, read and record the votes, and when all have been acted upon, the President of the Senate announces the result of the vote as thus ascertained. This announcement is a sufficient declaration of the persons, if any, elected President and Vice-President of the United States; and such declaration, together with a list of the votes, is then entered in the journals of the two Houses.

Contests as to Choice of Electors.—But contests as to the choice of electors sometimes occur, and two sets of certificates, each purporting to be a correct return of the electoral votes, are sometimes received from a single State. To meet this difficulty, the Act of 1887 provides that each State may by law prescribe a method for determining any contest or controversy as to the choice of electors for that State; and, if such determination is

actually made at least six days before the meeting of the electors, it shall be final.

If such contests are not settled by the States, provision is made for their determination by Congress.⁵

Clause 5.—No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

Qualifications of President.—When the Constitution was framed, many of the most prominent citizens of the United States were of foreign birth, and some of these were members of the Convention. As a mark of respect to them, the exception was inserted in favor of those who were citizens of the United States at the time of the adoption of the Constitution.

The residence contemplated by this clause does not debar from the Presidency persons who are or have been temporarily abroad in the public service or on their private affairs.

Clause 6.—In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may

5. An interesting and historical controversy arose in 1876. Double returns were received from a number of States. The Constitution, unfortunately, does not provide a method of determining such contests, and the situation had to be met by Congress. As the result of the election depended on these disputed returns, and as the two Houses were controlled by different parties, the problem had in it elements of danger. An extraordinary commission, composed of five senators, five representatives, and five justices of the Supreme Court, was finally decided upon. By a strict party vote of eight to seven, the contests were all decided in favor of the republican candidate, Rutherford B. Hayes. The quiet and orderly way in which this decision was accepted speaks well for the calm, good sense of our people and the stability of our institutions.

by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

Presidential Succession.—Under the authority of this clause it was at first provided by Congress that in case of a vacancy in the office of both the President and the Vice-President, the President of the Senate or, if there were none, then the Speaker of the House of Representatives for the time being, should act as President.⁶ But this law was repealed in 1886 by an act⁷ which provides that, in default of both a President and Vice-President capable of acting, the heads of departments shall succeed in the following order: the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Attorney-General, the Postmaster-General, the Secretary of the Navy, the Secretary of the Interior.⁸ The act makes its provisions applicable only to such of the above-named officers as are eligible to the office of President under the Constitution and are not under impeachment at the time. They must also have been duly appointed by the President, by and with the advice and consent of the Senate. If the Vice-President becomes acting President, he will hold the office until the expiration of the term for which the President was elected, except in the case where the cause of his succession is a temporary disability of the President, in which event he is to hold the office only until the disability is removed; and the same rule, it would appear, will apply to a member of the Cabinet succeeding under the terms of the law above mentioned.

It was early provided by an act of Congress⁹ that in case a President should desire to resign his office, the resignation should

[6. Rev. St. U. S., Secs. 146-150.

7. U. S. Stat., Vol. 24, p. 1.

8. The other departments had not been organized at that time.

9. Rev. St. U. S., Sec. 151.

be made by some instrument in writing declaring the same, subscribed by the party, and delivered into the office of the Secretary of State.

Clause 7.—The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive, within that period, any other emolument from the United States, or any of them.

The President's Salary.—The object of this provision is to add to the independence of the President, to place him beyond the fear or favor of Congress, by depriving that body of the power to force him to submit to its wishes by reducing or cutting off his salary, or to bribe his compliance by an increase thereof. The salary of the President was first placed at \$25,000 per annum, and so remained until it was increased to the present rate of \$50,000 by Act of March 3, 1873. As this statute was enacted on the last day of the first term of President Grant, who entered upon his second term on the next following day, it is regarded as having established a precedent to the effect that an increase of salary made after the re-election of a President may govern his compensation during the second term.¹⁰

Clause 8.—Before he enter on the execution of his office, he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

Oath of Office.—The above oath is usually taken by the President-elect in front of the Capitol at Washington, in the presence of both Houses of Congress. As a matter of precedent,

10. Black, Const. Law, p. 94.

it is administered by the Chief Justice of the Supreme Court, but any person having authority to administer an oath could legally perform the office. No oath is prescribed for the Vice-President, but, under the provisions of Article VI., clause 3, he is required to take an oath to support the Constitution of the United States. When he succeeds to the office of President, he takes the oath prescribed for the President.

Section 2, Clause 1.—The President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

Commander-in-chief.—The relation of the President to the armed forces of the United States must be considered from two points of view. In the first place, it is to be remembered that Congress is given power to declare war, to raise and support armies, to provide and maintain a Navy, and to make rules for the government and regulation of the land and naval forces. Under these grants of authority Congress may, therefore, enact laws on a great variety of subjects connected with the military and naval establishments, and the President, who is charged with the proper execution of the laws,¹¹ must see that they are faithfully observed, but in doing this he acts in his general capacity as Executive, and not in his capacity as Commander-in-chief. In the second place, he is vested, as Commander-in-chief, with a separate and independent grant of authority, which cannot be controlled or regulated by any other department of the

11. Art. II., Sec. 3, cl. 1.

Government. In his capacity as general Executive, the President may be charged with the duty of enforcing laws which regulate the enlistment of soldiers and sailors; prescribe the number, rank, and pay of officers; provide for ships, forts, arsenals, and the organization of the land and naval forces; define military offenses, authorize their punishment by courts-martial, and the like; and all these laws may leave him as great or as little choice of means in their execution as Congress may see fit. But in times of peace he controls the movements of the Army and Navy, prescribes the station and duties of officers and troops, and sends the vessels of the Navy wherever, in his judgment, it is expedient; so also, war having been declared by Congress or its existence otherwise begun, he has supreme control over all the movements and operations of the armed forces of the United States. He may resort to all means of waging war known to and recognized by the law of nations; he may regulate the government and control of occupied territory; and, in the theater of military operations, may maintain and enforce martial law. In theory, at least, he plans all campaigns, establishes all blockades and sieges, directs all marches, and fights all battles. In the exercise of these powers he acts as Commander-in-chief, and is not subject in any way to the control or dictation of Congress. It is only by furnishing or withholding means or supplies that Congress may exercise an indirect influence on the conduct of a war.

For the purpose of regulating the discipline and administration of the Army, Congress has enacted a code of military law, known as the "Articles of War"; but, under authority conferred by acts of Congress, or under his authority as Commander-in-chief, the President may issue regulations supplementary to the Articles of War, which, so long as they are not inconsistent with legislative enactments, will govern the details of military law and the order and discipline of the military establishment.

But it was not intended that the President should take the field in person or personally superintend the issuing of orders and regulations; these latter are made by the Secretary of War for the Army, and by the Secretary of the Navy for the naval forces, subject to the approval of the President, from whom they are supposed to emanate.¹²

The Cabinet.—The President is assisted in the discharge of his executive duties by a Cabinet, consisting of the heads of the several executive departments. These officers are styled collectively "the Cabinet," and individually are known as the Secretary of State, the Secretary of War, the Secretary of the Treasury, the Attorney-General, the Postmaster-General, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce and Labor. The heads of departments are the agents of the President, through whom, in matters of administration, he speaks and acts. They are generally responsible only to the President, and cannot be controlled by Congress or the courts, except in regard to specific duties laid upon them by law, or the performance of merely ministerial acts.¹³

The Constitution evidently contemplated the creation of executive departments. but it is a noteworthy fact that the above clause and a further one, which gives Congress authority to vest the appointment of inferior officers in the heads of departments, contain the only references to that very important branch of executive organization known as the Cabinet. The President often calls on the heads of departments for opinions in writing on subjects relating to their respective duties; but, in addition, it has been customary since Jefferson's time for the President

12. For cases dealing with the war-power of the President, see *U. S. v. Eliason*, 16 Pet. 291; *Little v. Barreme*, 2 Cranch, 170; *Milligan v. Hovey*, 3 Biss. 13; *The Prize Cases*, 2 Black, 635, 638; *Ex parte Milligan*, 4 Wall. 2.

13. Black, *Const. Law*, p. 102

to assemble the members of his Cabinet and advise and consult with them on all questions of administrative policy, both domestic and foreign. This is, however, discretionary with the President, and he is not in any case bound by the recommendations or opinions of his Cabinet. In him alone is vested the executive power. The acts of the several Cabinet officers are, in contemplation of law, the acts of the President, to whom they are responsible for their legality and propriety. The duties of the departments are sufficiently indicated by their names.

Reprieves and Pardons.—The power to grant reprieves and pardons for offenses against the United States is granted to the President by the Constitution, and is not, therefore, subject to control by Congress. But though he is vested with this power, it is held that Congress is not prevented from granting amnesty, either before legal proceedings are taken, during their pendency, or after conviction.¹⁴ "The distinction between pardon, amnesty, and reprieve seems to be that pardon permanently discharges the individual designated from all or some specified penal consequences of his crime, but does not affect the legal character of the offense committed; while amnesty obliterates the offense, declares that the government will not consider the thing done punishable, and hence operates in favor of all persons involved in it, whether intended and specified or not; and reprieve only temporarily suspends execution of punishment, leaving the legal character of the act unchanged and the individual subject to its consequences in time to come."¹⁵ A pardon may be granted before as well as after trial and conviction,¹⁶ and may be absolute or conditional. A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may be rejected by the person to

14. *U. S. v. Wilson*, 7 Pet. 160.

15. *Abb. Law Dict.*, "Pardon."

16. *Ex parte Garland*, 4 Wall. 334

whom it is tendered, and, if it is rejected, there is no power in the courts to force it on him.¹⁷ A pardon, to be available in subsequent judicial proceedings, must be pleaded, but a general act of pardon and amnesty will be judicially noticed by the courts.¹⁸ A pardon once granted and accepted cannot be revoked, but a pardon procured by fraud upon the pardoning power, whether by suppression of the truth, misstatement, suggestion of falsehood, or any other imposition, is absolutely void.¹⁹ The President was not granted power to pardon in case of impeachment, lest he should be tempted to save from punishment his favorites or dependents, who might be convicted of political or official offenses.

Clause 2.—He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

Treaties.—The power here conferred is in no wise limited by any consideration as to what may be the subject of a treaty, and the conclusion is that it embraces treaties of every sort and condition, and, subject only to the limitations imposed by the Constitution on the Federal Government, is as plenipotentiary in form as that held by any sovereign in any other society. In

17. *U. S. v. Wilson*, 7 Pet. 150, 161.

18. *Jenkins v. Collard*, 145 U. S. 546.

19. *Rosson v. State*, 23 Tex. App. 287; 4 Bl. Comm. 400.

considering the validity of a treaty, therefore, the only questions which can arise are: first, whether it is a proper subject of treaty according to international law or the usage and practice of civilized nations; and, second, whether it is prohibited by any of the limitations of the Constitution.

By implied limitation on the treaty-making power, any treaty which assumed to change the character of the Government, or was found to be inconsistent with the nature or structure thereof, or the objects for which it was founded, or which attempted to abrogate a power granted exclusively to another department, as, for instance, the power to regulate commerce, would be unconstitutional and void.²⁰

The treaty-making power is properly political in its character, but treaties when concluded become a part of the supreme law of the land. Because it is essentially political, the power to make treaties is properly vested in the President, but the perversion and unwise use of this power are prevented by requiring the ratification of the Senate. Perhaps, also, the fact that a treaty is a part of the supreme law of the land, superseding all previous conflicting laws of Congress and all repugnant provisions in State constitutions or laws, suggests a reason why the advice and consent of the Senate were made necessary to its validity. But the Senate cannot make treaties nor dictate their terms. It may suggest amendments to a completed treaty, but these must be accepted by the President, as well as by the other contracting power, to be of any effect. The signature of the President is necessary to the validity of a treaty, and it does not take effect, though ratified by the Senate, until he has signed it.²¹ Treaties, when ratified, relate back to and take effect from the date of signing,²² except where they would thus impair indi-

20. *Geofrey v. Riggs*, 133 U. S. 258.

21. *Shepard v. Ins. Co.*, 40 Fed. 341.

22. *Davis v. Police Jury*, 9 How. 280.

vidual rights which became vested before the ratification. So far as it concerns such rights, it is considered as concluded only when there has been an exchange of ratifications.²³

Where the appropriation of money is necessary to carry into effect the terms of a treaty, the House of Representatives has claimed the right of passing upon the treaty before voting the appropriation. It is evident, however, that if this right be conceded, the President and Senate will be deprived of an important division of their treaty-making power. It is probably correct to say that it is the duty of the House to give effect to a properly ratified treaty by voting the necessary supplies, but that there is no legal method whatever by which it can be coerced into the performance of this duty. When a treaty and a law of Congress are found to be in conflict, the later, in point of time, prevails, unless by fair judicial construction the repugnance can be removed. Though made by different branches of the Government, they are of equal authority.²⁴ But, as indicated above, any State enactment, whether constitutional or statutory, which is in conflict with a treaty, whether made before or after the treaty, must give way to it.

Nominations to Office.—Before the President can exercise his authority to appoint to an office, it must first have been created by the Constitution or by law, and it must be one the appointment to which is not otherwise provided for in the Constitution. His nominations must be submitted to the Senate, which body may reject any it does not approve. The Constitution makes provision for some few offices, such as President, Vice-President, electors, and the officers of the two Houses, but it is in general the duty of Congress to determine what offices shall be created and for what purpose; but when the office has been created, it is the right of the Executive to choose the in-

23. *Haver v. Yaker*, 9 Wall. 32.

24. *Foster v. Neilson*, 2 Pet. 253.

cumbent. In order that the President may have, particularly in the higher grades of office, the duties of which are political and involve the exercise of discretion, the services of officers who are in sympathy with his administration, it is proper that he should have been vested with the power of appointment. The approval of the Senate serves to prevent the unrestrained use of this power to accomplish his own selfish or disloyal purposes.

Difficulty has arisen in deciding upon the meaning to be given the term "inferior officers," as used in the Constitution. It has been held that it is not used in the sense of petty or unimportant, but that it means subordinate or inferior to those officers in whom respectively the power of appointment may be vested—the President, the courts of law, and the heads of departments.²⁵ But Congress has never gone to this length in providing for the appointment of such officers. As an illustration of the ground actually taken, it may be mentioned that postmasters of the fourth class are appointed by the Postmaster-General, and that warrant officers of the Navy are appointed by the President alone, while postmasters of the first three classes and commissioned officers of the Navy are appointed by the President and confirmed by the Senate.

As to when an appointment to office becomes complete, so, as to place the appointee beyond the arbitrary will of the Executive, it has been held that the appointment is final and complete when the commission has been signed by the President.²⁶ The power of appointment necessarily includes the power of removal. The Constitution is silent on the subject of removal from office, but it may be stated that the whole course of executive and legislative interpretation of the Constitution from the earliest times, as well as the settled precedents, have prac-

25. *Collins v. U. S.*, 14 Ct. Cl. 568.

[26. *Marbury v. Madison*, 1 Cranch, 137.

tically determined that the power to remove public officers, when not otherwise expressly provided for, resides in the President alone.²⁷ This interpretation was for a time reversed by the "Tenure of Office Act," passed in 1867, which denied the President the power to remove from office without the consent of the Senate in all cases where the consent of the Senate had been necessary to the appointment. This statute was repealed in 1887; its repeal apparently concedes the correctness of the rule stated above.

Clause 3.—The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.²⁸

Filling of Vacancies.—When a vacancy happens during a recess of the Senate, the President may, in his discretion, make an appointment to such office, but the appointee's commission will hold good only until the end of the next session; it will, however, hold until this time, even though the person commissioned has been nominated to the office and his nomination rejected by the Senate, unless sooner terminated by the President.²⁹ Pomeroy asserts that "if language can express any thought, it is clear that a vacancy must not have commenced during a session and have extended into the recess, but must

27. Pomeroy, Const. Law, Secs. 647-661.

28. The following decisions affecting the appointing power may be of interest: The President has power, by and with the advice and consent of the Senate, to displace an officer in the Army or Navy by the appointment of another person in his place. *Mullan v. U. S.*, 140 U. S. 240. But he has no authority to revoke an order dismissing an officer from the service and restoring the discharged officer to his rank. *Palen v. U. S.*, 19 Ct. Cl. 389. When the number of officers in a given rank or grade of the regular Army is expressly fixed by law, it is not in the power of the President to make appointments in excess of the limits thus fixed. *Montgomery v. U. S.*, 5 Ct. Cl. 93.

29. *In re Marshalship of Alabama*, 20 Fed. 379.

have commenced during the recess.”³⁰ But it has been held by the courts that if a vacancy in an office occurs during the session, but remains unfilled at the end of the session, this is a case of a vacancy “happening” during the recess.³¹ The question as to whether a newly created office not filled during the session of the Senate presents a vacancy within the meaning of this provision has, in practice, been decided both ways, but the better opinion seems to be that it does not, and that the President cannot during the recess fill such office without special authority. If a person commissioned during a recess is nominated to the office, and his appointment is approved by the Senate, he is granted a new commission and is required to take a new oath of office. The reason and necessity of this grant of power to the President are obvious and require no comment.

Section 3, Clause 1.—He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Presidential Messages.—Under the first two Presidents it was customary for the Chief Executive to meet the two Houses in person at the opening of each session and address them upon the state of the Union, recommending at the same time such legislation as he considered important or necessary; but Mr. Jefferson began the practice, which has since continued, of sending

30. Pomeroy, Const. Law, p. 436.

31. *In re Farrow*, 4 Woods, 491, 3 F. R. 112.

written messages to Congress. In addition to the annual messages, sent at the opening of each session of Congress, special messages are sometimes sent, dealing with particular topics of national interest, and often accompanied by correspondence or other documents. The importance of this mandatory provision is seen when we remember that a great many of the details of practical administration are under the personal supervision of the President and his heads of departments, and can be known to Congress only by this means. Congress also sometimes requests the President to furnish it with facts or papers in his possession relating to certain subjects under consideration. It is of the utmost importance that Congress should have the most full and complete knowledge of the state of the Union, in order to best frame its laws with reference to public needs and interests.

Convening and Adjourning Congress.—It will be easily seen that occasions may arise during a recess of Congress, such as foreign aggressions, depredations, or direct hostilities, insurrections at home, great public calamities, or financial crises, which demand the immediate consideration and action of the national Legislature, or in which the Executive cannot well dispense with its assistance. It is, therefore, proper that the power to convene Congress in special session should be vested in the President, and the power to adjourn them, in case of disagreement between the Houses, is said to be equally as indispensable. It is the only peaceable way of ending a controversy which can lead to nothing but distraction in the public councils.³² The Senate is often convened in special session for the purpose of acting on treaties and the nomination of officers. This is usually done when a President is inaugurated, for the purpose of confirming his Cabinet officers.

32. Story, Secs. 1562-1563.

Diplomatic Relations.—The power to receive the diplomatic agents of foreign governments, combined with the power to make treaties and to appoint the diplomatic agents of our own Government, gives the President control over all the foreign relations of the United States. It is to be noted that foreign consuls are not mentioned in this clause. They do not come under the designation of "public ministers," for they are not diplomatic agents, but mere, commercial representatives. The power of the Executive to receive them may, however, be fairly implied from other parts of the Constitution, and foreign consuls have, in fact, never been allowed to discharge any functions of their office until they have received the *exequatur* of the President. The power to receive foreign ministers necessarily implies the power in the President to refuse to receive any particular person accredited to him by a foreign government. The ground of his refusal may be that he is unwilling to consider the special subject with relation to which the diplomatic agent is sent, or that he prefers not to recognize the accrediting authority as the rightful government, or his reasons may be merely personal to himself; and, after a foreign minister has been received by the President, the latter has the power, for reasons satisfactory to himself, to request the accrediting government to recall the minister, or, in case of refusal or delay in recalling him, to dismiss him, or refuse longer to hold relations with him.³³ By receiving the diplomatic representative of a foreign government the President, in effect, decides that the government sending him is at least the *de facto* government of that country. Decisions of this character are political in their nature and must be made by the political departments, whether by the President alone or by the President with the aid of Congress. The courts will not take notice of or recognize any new government or sov-

33. Black, Const. Law, p. 117.

ereignty until it has been officially recognized by the political departments of the Government.³⁴

Under the law of nations, public ministers are accorded peculiar and important privileges. By a political fiction they are regarded as continuing within the jurisdiction of their own sovereigns, and not as coming within that of the country to which they are accredited. They are not, therefore, amenable to the laws of the country in which they reside, but continue subject to the laws of their own country. Consuls, not being public ministers, are not entitled to these privileges and immunities, but are answerable in civil and criminal matters to the laws of the country in which they are serving. Public ministers are divided into four classes. Ambassadors constitute the highest class, and the privilege of sending them is confined to the crowned heads, the great republics, and other states entitled to royal honors. The principle of reciprocity usually governs the sending of diplomatic agents, those exchanged by any two Governments being of the same rank. The Senate is given no part in the reception of public ministers, though, as has been seen, its concurrence is necessary to the appointment by the President of public ministers and consuls.

Execution of the Laws.—The great object of the Executive Department is to see that the laws are faithfully executed. Without this the Government, no matter what its form may be, will fail of its purpose, and will not be able to protect the rights or provide for the happiness, good order, or safety of the people. The President “is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them, and to fill vacancies. He is declared to be the Commander-in-chief of the Army and Navy of the United States. The duties which are

34. *Gelston v. Hoyt*, 3 Wheat. 324; *Luther v. Borden*, 7 How. 1.

thus imposed upon him he is further enabled to perform by the recognition in the Constitution and by the creation by acts of Congress of executive departments, . . . the heads of which are familiarly called Cabinet Ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.' "

Commissions.—It is also made the duty of the President to commission all officers of the United States. A commission may be defined to be a document issued by the Government to its officers, conferring on them the power to perform the various duties pertaining to their offices. It is signed by the President, countersigned by the head of the department in which it issued, and has affixed the great seal of the United States.

Section 4, Clause 1.—The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

Removal from Office on Impeachment.—In the first place, it will be observed that the language of this clause excludes all private and unofficial persons, and, in the next, that it excludes all officers of the Army, the Navy, and the Marine Corps, because they cannot properly be called "civil" officers. By a legislative precedent, also, a senator or representative of the United States is not liable to impeachment. In 1897, upon the trial of an impeachment preferred against Senator William Blount, the senators decided that the members of their own body are not civil officers within the meaning of the Constitution, and therefore dismissed the charges without any examination upon the merits. The decision in this case is not favorably regarded by writers on constitutional law, and it is thought

that, should occasion ever cause it to be reviewed by the Senate and House, it would probably be disregarded.³⁵ As far as the matter may be said to be settled, it appears that the officers liable to this process are those who are commissioned by the President (as provided by Article II., Section 3, of the Constitution), excepting those employed in the land and naval forces, but including all Federal judges.

Treason against the United States is defined by the Constitution, and bribery is "the receiving or offering of any undue reward by or to any person whose ordinary profession or business relates to the administration of public justice in order to influence his behavior in office and incline him to act contrary to the known rules of honesty and integrity."³⁶ But the phrase "other high crimes and misdemeanors" is not susceptible of exact definition or limitation. It is, of course, primarily directed against official misconduct; but, from the provision of the Constitution that the party shall still remain liable to trial and punishment according to law, we are led to infer that the commission of any crime which is of a grave nature, though it may have nothing to do with the person's official position, would render him liable to impeachment. The power to determine what offenses are punishable by impeachment rests very much with Congress. The House, before preferring articles of impeachment, will have to decide whether the acts or conduct complained of constitute a "high crime or misdemeanor," and the Senate in trying the case will have to consider the same question. In either case there is no other power which can review their decisions.

35. See Pomeroy. Const. Law, Secs. 715-728.

36. Greenleaf.

CHAPTER VI.

THE JUDICIARY.—ARTICLE III. OF CONSTITUTION.

Section 1, Clause 1.—The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

The Federal Judicial System.—The Constitution provides for the Supreme Court, and gives Congress authority to establish such inferior courts as may from time to time be found necessary. In pursuance of this authority, Congress has provided for certain courts, which, together with the Supreme Court, constitute the Federal judicial system. They are the Circuit Courts of Appeals, the Circuit Courts, the District Courts, and the Court of Claims. In addition, Congress has authorized the following local or special tribunals, which are not a part of the Federal judicial system: the Territorial Courts, the Courts of the District of Columbia, Consular Courts, and Courts-martial.

Organization of the Federal Courts.—The organization of the Supreme Court is not prescribed by the Constitution, but is left to the discretion of Congress. As at present organized, it consists of a Chief Justice and eight associate justices, of whom six constitute a quorum. The several States are divided into districts, there being one or more for each State, and seventy-three for the whole United States. In each of these is estab-

lished a District Court, consisting of a single judge. Contiguous districts are grouped, by entire States and Territories, so as to form circuits, there being nine for the whole United States. In each circuit there have been established a Circuit Court and a Circuit Court of Appeals. Two, and in some cases three, circuit judges are appointed for each circuit, and to each is assigned, also, one of the justices of the Supreme Court. A Circuit Court may be held by the justice of the Supreme Court assigned to a circuit, by one of the circuit judges, or by a judge of any district within the circuit, or by any two, Supremé, circuit, or district, judges sitting together. The Circuit Court of Appeals is composed of three judges, two of whom constitute a quorum. The justice of the Supreme Court assigned to any circuit and the circuit judges thereof usually constitute the Circuit Court of Appeals, but the district judges within the circuit are also competent to sit on this court, and they may be assigned to duty thereon, if at any time the full court is not made up by the attendance of the justice of the Supreme Court and the circuit judges. But it is provided that no judge before whom a cause or question may have been tried or heard in a Circuit or District Court can sit on the trial or hearing of such cause or question in the Circuit Court of Appeals. The Court of Claims is composed of five judges, two of whom constitute a quorum.

Terms of Court.—The Supreme Court is required to hold, at the seat of Government, one term annually, commencing on the second Monday in October, and such adjourned or special terms as it may find necessary for the dispatch of business.

The Circuit Court of Appeals is required to hold one term annually at specified places within the circuit, and such other terms at such other places as the court may from time to time designate.

The Circuit Court is required to hold two or more terms annually in each district, but the justice of the Supreme Court assigned to the circuit is not required to attend more than one

term of the Circuit Court in each district during any period of two years. Circuit Courts may be held at the same time in the different districts of the same circuit.

Each District Court is required to hold annually a stated number of terms, usually four, and monthly adjournments of their regular terms, for the trial of criminal causes, when these are found necessary in order to prevent undue expense and delays in such cases. They are also authorized to hold such special terms as their business may require.

The Court of Claims holds, at the seat of Government, one annual term, commencing on the first Monday in December.

Tenure of Office of Judges.—The judges both of the Supreme and inferior courts hold their office during good behavior. They are appointed by the President and Senate, but they can be removed from office only on impeachment. The number of justices of the Supreme Court may be indefinitely increased, but this clause would operate to prevent a decrease in their number, except under a provision that vacancies as they occur should not be filled until the number of justices was reduced to a prescribed minimum. As far as the courts established by Congress are concerned, there is a legislative precedent for saying that Congress may legislate a judge of such courts out of office by abolishing the court in which he sits.¹ Both Supreme and inferior judges receive a salary, which cannot be diminished during their term of office, but the salaries of the judges of the Federal courts may be reduced by a provision similar to that indicated above for reducing the membership of the Supreme Court. These provisions with regard to tenure of office and salary were intended to secure the complete independence of

1. Reference is here made to the abolition of the District Court, when Mr. Jefferson became President.

the Federal judiciary, a condition indispensable to the proper administration of public justice.²

Officers of Courts.—The courts of the United States have power to appoint clerks, who are charged with the seals and records, are required to sign and seal all process, and seasonably to record the decrees, judgments, and determinations of their respective courts. Such clerks are required to take an oath of office and also to furnish security in the sum of \$2,000 for the faithful discharge of their duties. There is appointed for each district, by the President and Senate, a marshal, whose duty it is to attend the United States courts sitting within his district, and to execute therein all lawful precepts directed to him and issued under the authority of the United States. He may appoint one or more deputies, is required to furnish security in the sum of \$20,000 for the faithful performance of duty by himself and his deputies, and, together with them, to take an oath of office.

Courts Not Belonging to the Federal System. 1. Territorial Courts.—The Territorial courts are legislative courts, organized by Congress for the Territories of the United States, and created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause of the Constitution which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. They are not constitutional courts, in which the judicial power conferred by the Constitution on the general Government can be deposited.³ Congress may, therefore, invest them with as much or as little jurisdiction as it sees fit, or with such measure

2. By Act of April 10, 1869, it is provided that any judge of any court of the United States, having held his commission ten years and having attained the age of seventy years, may resign his office and receive the same salary during life which was payable to him at the time of his resignation.

3. *American Ins. Co. v. Canter*, 1 Pet. 511.

as appears reasonable, necessary, and adapted to the local, prevailing conditions.

2. Consular Courts.—Under the authority of treaties, granting rights of ex-territoriality, Congress has provided for courts, called “consular courts,” in certain non-Christian countries. They are presided over by the United States consuls at the ports where the courts are held, and are invested with civil and criminal jurisdiction over Americans in that place. The trial is without a jury. The purpose of establishing these courts is to withdraw citizens of the United States from the operation of the crude, barbarous, or uncertain systems of justice there prevailing.

3. Courts-martial; Military Commissions.—Under its power to make rules for the regulation of the land and naval forces, Congress has authority to provide for the trial and punishment of military and naval offenses by courts-martial—that is, courts composed of military or naval officers. But these courts are not a part of the Federal judicial system; they are merely executive agencies, authorized as an aid in commanding the Army and Navy and enforcing discipline therein. Their authority is strictly limited, and the records of their proceedings must show in each case that they have jurisdiction over the person and the offense. They can never lawfully try and punish a person who is not in the military service or subject to military law; but within their jurisdiction their judgments are as final and conclusive as those of civil courts of last resort. The sentence of a court-martial is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, except on a question as to the jurisdiction of the court-martial or a failure to observe the rules prescribed for the exercise thereof.⁴ If a court-martial proceeds without jurisdiction, all its actions are illegal. The aggrieved party may not only recover his liberty on *habeas*

4. *Dynes v. Hoover*, 20 How. 65; *In re McVey*, 23 Fed. 878.

corpus, but may, in a proper action in a civil court, recover damages against any of the parties to the illegal trial, since they are all trespassers upon his rights.⁵ Military commissions are established only in actual warfare or where martial law has been declared, and as an aid to the successful prosecution of belligerent operations or the enforcement of martial law.

Section 2, Clause 1.—The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

Clause 2.—In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The language of the first of the above clauses is to be noted. The judicial power—that is, jurisdiction—of the United States shall extend to all cases, etc.

Definition of Jurisdiction.—The jurisdiction of a court is its power or capacity to grant a remedy, and thus to protect some primary, legal right or enforce some primary, legal duty. Original jurisdiction is the power to hear and decide a legal con-

5. *Dynes v. Hoover*, 20 How. 65; *Milligan v. Hovey*, 3 Biss. 13.

troversy, or to administer a remedy in the first instance. Appellate jurisdiction is the power to review the act or decision or determination of some other court. The same court may have both original and appellate jurisdiction, and a court of appellate jurisdiction may be intermediate between a lower court and a higher by which its own decisions may be reviewed. Courts are also said to possess exclusive or concurrent jurisdiction. A court has exclusive jurisdiction when it alone can take cognizance of a particular class of cases, or can administer some particular remedy. Two or more courts have concurrent jurisdiction when the suit or proceeding might have been originally instituted in either. Original jurisdiction may, therefore, be exclusive or concurrent.

Definition of Case.—A case, in the sense of the Constitution, is a controversy between parties which has taken shape for judicial decision. Cases in law mean cases in which relief is sought according to the principles and practice of the common law; cases in equity mean cases in which relief is sought according to the principles and practice of equity jurisprudence. A case is said to arise under the Constitution, or a law, or a treaty of the United States when its correct decision depends upon the construction of any one. "The judicial power shall extend to all *cases*" of a particular character. Before there can be any proper exercise of the judicial power, therefore, a "case" must be presented in court for its action.

Jurisdiction of the Federal Courts.—From the first of the above clauses of the Constitution it will be seen that the jurisdiction of the Federal courts extends to all cases arising under the Constitution, the laws, or the treaties of the United States and to eight other descriptions of cases. In cases arising under the Constitution, the laws, or treaties of the United States it is the character of the suit which gives jurisdiction, without reference to the parties. In the other cases enumerated the jurisdiction depends entirely upon the character of the parties,

without reference to the subject of controversy. With reference to cases of the first class, it may be remarked that the orderly and successful working of Government, or even its very existence, depends upon a fixed and harmonious interpretation of the organic law and the statutes passed in pursuance of it; and it is, therefore, of the utmost importance that the Federal courts were given authority to assume jurisdiction of all cases arising under the Constitution, laws, or treaties of the United States. With reference to the remaining cases, it is seen that cases affecting ambassadors, other public ministers, and consuls, cases of admiralty and maritime jurisdiction, and cases where one of the parties is a foreign state or one of its subjects or citizens and the other is a State of the Union or one of its citizens, are of such a nature that their settlement may involve the foreign relations of the United States. The policy of wholly depriving the States of any control over our foreign relations indicates the reason why the right to make final and authoritative decisions in these cases was reserved to the courts of the Federal Government. Because the United States is supreme, sovereign, and independent, it is eminently proper that it should be able to bring the actions to which it is a party in its own tribunals. And since the States stand to each other in the relation of equality, it is fitting that they should have been given power to implead each other in the tribunals of their common superior. The cases not already mentioned were placed under the jurisdiction of the federal courts through a desire to furnish tribunals free from partisan influences in those cases where it was feared that local interests might prevent perfect justice being done to suitors.

Jurisdiction of the Supreme Court—(a) Original.—The Constitution provides that the Supreme Court of the United States shall have original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and in cases in which a State shall be a party; but this jurisdiction is not made exclusive. It is not incompetent, therefore, for Congress to

invest the lower Federal courts with a like original jurisdiction, concurrent with that of the Supreme Court, and this it has done by providing that the Supreme Court shall have exclusive original jurisdiction in all such cases or proceedings as, under the law of nations, can be brought *against* ambassadors or other public ministers or their domestics or domestic servants, and that in all cases brought by ambassadors or other public ministers, or in which a consul or vice-consul is a party, it shall have concurrent original jurisdiction; and in cases in which a State is a party it shall have exclusive original jurisdiction in all controversies of a civil nature, except those between a State and its citizens, or between a State and citizens of other States, or aliens, and that in these cases it shall have concurrent original jurisdiction.^{5½} It is to be noticed that it is beyond the power of Congress to invest the Supreme Court with original jurisdiction in any other class of cases.

(b) **Appellate.**—The provision of the Constitution with respect to the appellate jurisdiction of the Supreme Court is not self-executing, and Congress must legislate to give it effect. Under existing enactments of Congress the Supreme Court has appellate jurisdiction

1. **From the Circuit or District Courts** direct in the following cases: where the jurisdiction of the court is in issue; from final sentences and decrees in prize cases; in case of conviction of a capital or otherwise infamous crime; in cases involving the construction or application of the Constitution of the United States; in cases involving the constitutionality of an act of Congress or a treaty, or in which the Constitution or a law of any State is claimed to be in contravention of the Constitution of the United States. It has appellate jurisdiction

2. **From the Circuit Courts of Appeals** in all cases not made final in those courts where the matter in controversy exceeds one thousand dollars and costs; provided the appeal be

taken or writ of error sued out within one year after the entry of the order, judgment, or decree sought to be reviewed. But in any case within its jurisdiction the Circuit Court of Appeals may certify to the Supreme Court any question of law concerning which it desires the instruction of that court for its proper decision; and the Supreme Court may require, by *certiorari* or otherwise, any case in the Circuit Court of Appeals to be certified to it for its review and determination:

3. From the Court of Claims the Supreme Court has appellate jurisdiction in all cases where the judgment is adverse to the United States, and, on behalf of the plaintiff, in any case where the amount in controversy exceeds three thousand dollars.

4. From the State Courts.—A final judgment or decree in any suit in the highest court of a State in which a decision in the case could be had may be re-examined and reversed or affirmed in the Supreme Court: first, where there is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity; second, where there is drawn in question the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, a treaty, or law of the United States, and the decision is in favor of their validity; or third, where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the right, title, privilege, or immunity so set up or claimed by either party.

5. From Territorial Courts.—The Supreme Court has appellate jurisdiction to review the decision or judgment of the highest court of any Territory in any case where is drawn in question the validity of any treaty, statute, or authority exercised under the United States, or in any case where the amount in controversy exceeds five thousand dollars, exclusive of costs; but if the case belongs to a class in which the decision of the

Circuit Courts of Appeals is final, it can be taken to the Supreme Court only as above explained for such cases.

Jurisdiction of the Circuit Courts of Appeals.—The jurisdiction of these courts is appellate only. In all cases, except those above mentioned, where an appeal or writ of error can be taken direct to the Supreme Court from the Circuit and District Courts, the final decisions of these courts may be reviewed on appeal or writ of error by the Circuit Courts of Appeals. This appellate jurisdiction is made final in all cases in which the jurisdiction is entirely dependent on the parties to the suit or controversy, as between aliens and citizens of the United States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases. This also applies to cases coming from the highest courts of the several Territories, which are, by order of the Supreme Court, assigned to particular circuits for this purpose.

Jurisdiction of the Circuit Courts.—The Circuit Courts have exclusive original jurisdiction of all crimes and offenses against the United States, the punishment of which is capital, and of all cases arising under the patent, copyright, or bankrupt laws of the United States. They have jurisdiction, concurrent with the District Courts, of all crimes and offenses against the United States, the punishment of which is not capital, and with the State courts in cases arising under the Constitution or laws or treaties of the United States, and also those involving controversies between citizens of different States, provided the amount in controversy exceeds two thousand dollars. If the sum in dispute falls below that amount, the State courts have exclusive original jurisdiction.

Jurisdiction of the District Courts.—The District Courts have exclusive original jurisdiction of all cases of seizures under the impost, navigation, or trade laws of the United States, whether the seizures are made upon the high seas or the navigable waters of the United States, and of all suits for penalties

and forfeitures under these laws, also of all suits against consuls and vice-consuls; they have also jurisdiction of all civil causes of admiralty and maritime jurisdiction, but in these cases the right to a common-law remedy is reserved to suitors where the common law is competent to give it. They have jurisdiction concurrent with the Circuit Courts, as indicated above.

Jurisdiction of the Court of Claims.—The Court of Claims has jurisdiction of all claims against the United States. It was organized in 1855, for the purpose of giving those having claims against the United States a means of proving them. The court reports to Congress all claims decided against the United States, and appropriations are made for their settlement.

Removal of Causes.—In order to secure the ends for which the grant of judicial power was made, provision has been made by enactments of Congress for the removal of certain kinds of actions from the State courts in which they are begun into the Federal courts for trial and decision, subject to certain conditions and limitations. But the right so to remove a cause from a State court to a Federal court is entirely statutory, and unless the case comes clearly within the statute, the Federal courts will not take jurisdiction;⁶ and it is for the Federal courts to decide whether the case is one which is properly removable and whether the proper steps have been taken to effect a removal.⁷

Law Administered. Practice.—There is no common law of the United States, as such, which can be appealed to as conferring jurisdiction upon its courts. They can, then, possess no other jurisdiction than that conferred by the Constitution and acts of Congress in pursuance thereof.⁸ There can be no common-law crimes against the United States, and, unless an act has been made a crime by the Constitution or by statute,

6. *Insurance Co. v. Pechner*, 95 U. S. 183; Stat. U. S., Vol. 25, p. 433.

7. *Osgood v. Chicago, D. & V. R. Co.*, 6 Biss. 330.

8. *Pennsylvania v. W. & B. Bridge Co.*, 13 How. 518.

it cannot be punished by the general Government.⁹ But it is a general rule that where a case is not governed by any Federal statute or treaty, the Federal courts will administer the law of the State wherein they sit, and will take notice of the common law of the State and its statutes and customs, and apply them as the courts of the State would apply them to the same circumstances.¹⁰ In deciding cases arising under the constitution or laws of a State, the Federal courts are always careful to accept and follow the decisions of the State courts, when such exist, as to what is the proper rule of law for the case in hand. And the Federal courts conform their practice in all cases at common law to that of the State in which they sit. If the State has adopted a code of procedure, proceedings in the Federal courts in actions at law are governed by the code. If the State adheres to the common-law pleading and practice, the Federal courts will do the same. But proceedings in equity are not affected by this rule. In regard to jurisdiction in equity, the acts of Congress provide that the practice in the Federal courts shall be substantially the same throughout the Union.¹¹

In connection with the jurisdiction of the Federal courts should be considered the

Eleventh Amendment.—The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

In *Chrisholm v. Georgia*¹² it was held by the Supreme Court that, under the language of the Constitution and the Judiciary Act of 1789, a State of the Union could be sued in the Federal

9. *U. S. v. Eaton*, 144 U. S. 677.

10. Black, *Const. Law*, p. 158.

11. *Hurt v. Hollingsworth*, 100 U. S. 100.

12. 2 Dall. 419.

courts against its will by a citizen of another State or an alien. This decision occasioned so much surprise and apprehension that at the first meeting of Congress after its promulgation the above amendment was proposed, and it was in due course adopted. As the law and decisions now stand, a State, without its consent, cannot be sued by any private person, whether it be one of its own citizens, or a citizen of another State, or an alien.¹³ But a State may be sued, without its consent, by the United States, by another State, and probably also by a foreign prince or Government.¹⁴

Clause 3.—The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

In connection with this clause should be considered the amendments to the Constitution which relate to the judiciary, and, in immediate connection, those which further enlarge the right of trial by jury.

Sixth Amendment.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Seventh Amendment.—In suits at common law, where the value in controversy shall exceed twenty dol-

13. It is now customary for a State to make provision for the maintenance of suits against it by private persons in its own courts.

14. Black, Const. Law, p. 145.

lars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Trial by Jury.—As used in the Constitution, the terms “jury” and “trial by jury” have the same meaning as they had at common law. A jury for the trial of a cause was a body of twelve disinterested and impartial men, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled, and sworn to render a true verdict according to the law and the evidence given therein. The jury sits with the judge to try the facts of the controversy, receiving from him the law and applying it, according as they find the facts to be, in a general verdict, which embodies both fact and law; or, at their option, the jury may find the facts specially and report them to the court, who will then determine what judgment the facts require. The court is thus the trier of the law and the jury the triers of the facts. At common law their verdict was required to be unanimous, and this feature, though of doubtful value, is preserved in jury trials in the United States and in most of the States. Trial by jury has always been an object of deep interest and solicitude to the American people, and every encroachment upon it has been watched with great jealousy.¹⁵

In Criminal Cases.—Trial by jury in criminal cases has been looked upon as a necessary part of the liberties of the people, and a sentiment attaches to it which will scarcely suffer its value to be questioned. Under the Constitution the accused person in all criminal cases, except those of impeachment, is guaranteed the right of trial by jury in the State in which the crime was committed, and the Sixth Amendment adds to this guarantee the right to a speedy and public trial by an impartial jury of the State and district wherein the crime was committed,

15. Cooley, Prin. Const. Law, p. 248-251.

and provides further that the district must have been previously ascertained by law. In cases where the crime is not committed within any State, Congress, in pursuance of the constitutional provision, has provided that the trial shall be held in the district in which the offender is apprehended or into which he may be first brought.

In Civil Cases.—The Seventh Amendment, given above, provides that the right of trial by jury shall be preserved in suits at common law, where the value in controversy shall exceed twenty dollars; also that when a fact has been once tried by a jury, it can be re-examined only according to the rules of the common law. This limitation is essential to the preservation of the right of trial by jury. If, after a fact had been tried by a jury in the first instance, the case could be removed by either party into another court, there to be tried by the judge himself, the right of trial by jury could be of no importance. The finding of the jury upon the facts, when not influenced by error, and when there has been no fraud or surprise, must be taken as conclusive. According to the common law, facts once tried by a jury are never re-examined, unless a new trial is granted by the court before which the suit is pending, or unless a superior court, on writ of error, reverses the decision of the trial court and orders the summoning of a jury for a new trial. By suits at common law is here meant not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit.¹⁶ This amendment applies not only to cases tried by jury in the Federal courts, but also to such as are tried by jury in the State courts and after-

16. *Parsons v. Pedford*, 3 Pet. 433, 447.

ward removed to the Supreme Court for review under its appellate jurisdiction. Applying our rules for the interpretation of the Constitution, it will be seen that the provisions of that instrument with regard to trial by jury do not operate to require trials before State courts to be by jury, or even to prevent the States from abolishing jury trials altogether.

Other Privileges.—The other privileges guaranteed by the above parts of the Constitution are that the accused shall be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

The accused is made aware of the nature and cause of the accusation by being furnished with a copy of the indictment which carefully sets forth both. Congress has by law provided that in cases of treason the accused shall have a copy of the indictment delivered to him at least three entire days, and in other capital cases at least two entire days, before the trial. He is to be confronted with the witnesses against him, or “to meet the witnesses face to face.” This guarantee was intended as a safeguard against secret and inquisitorial methods of trial. It also gives the defendant the privilege of sifting and trying by cross-examination the evidence adduced against him. But it does not prevent the admission of dying declarations, since, in this case, the “witness against him” is the person who narrates the declaration made by the decedent, or who produces and identifies the same if it was reduced to writing.¹⁷ Nor does it prevent the admission of depositions or notes of evidence made at a previous trial, where the witness is dead, or out of the jurisdiction, or not to be found at the time of the trial, provided that the defendant was present at the first trial and had an opportunity to cross-examine. He is to have compulsory process for securing the

17. *Mattox v. U. S.*, 156 U. S. 237.

presence of witnesses in his favor. This grows out of the right of defendant to rebut by the testimony of witnesses the charges brought against him, and includes the right to examine such witnesses and to compel them to answer admissible questions under oath. But it does not give the accused a claim against the Government for payment of the fees of the witnesses summoned in his defense.¹⁸ He is finally to have the assistance of counsel for his defense. This includes the right to have a private interview and consultation with his counsel before the trial, or even before indictment found, if he is under arrest, in order to take his advice and instruct him as to the defense to be made.¹⁹ But it does not guarantee that a person accused of crime shall have counsel furnished at the expense of the public.²⁰

Fifth Amendment.—No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Grand Jury.—The right to have offenses inquired into by a grand jury in order to determine, before a public prosecution, whether there is sufficient evidence to warrant the same, has always been regarded as a safeguard against tyranny and oppression. The grand jury is said to have been an established institution of the English law long before the Norman conquest. At

18. *State v. Waters*, 39 Me. 54.

19. *People v. Risely*, 13 Abb. N. C. (N. Y.) 186.

20. *Houk v. Board, etc.*, 14 Ind. App. 662.

the common law it was composed of not less than twelve nor more than twenty-three men, and the concurrence of at least twelve of this number was absolutely essential to the finding of an indictment. By Section 808, Revised Statutes, a grand jury for the Circuit and District Courts of the United States is made to consist of not less than sixteen nor more than twenty-three men, but the number required to concur in the finding of an indictment has not been changed. An indictment is a written accusation of an offense preferred to a grand jury and presented upon oath by them as true, at the suit of the Government. It is usually framed, in the first instance, by the officers of the Government, and laid before the grand jury for their investigation. If at least twelve concur in finding sufficient evidence to warrant a public prosecution, they return it endorsed as "A true bill"; but if not, it is returned as "Not a true bill," or "Not found." A presentment, properly speaking, is an accusation of an offense, made by a grand jury on their own initiative, upon their own observation and knowledge, or upon evidence before them, without any bill of indictment submitted to them at the suit of the Government. When a presentment is made, the proper officer of the court must frame an indictment before the accused party can be put to answer it. This provision applies only to capital, or otherwise infamous, crimes. The courts of the United States have decided that, within the meaning of the Fifth Amendment, an infamous crime is one which is punishable by imprisonment in a State prison or penitentiary, with or without hard labor.²¹ But mere misdemeanors which involve infamy neither in the offender nor in the punishment may be proceeded against by information, which may be defined as an accusation in the nature of an indictment, presented by a competent public officer on his oath of office, instead of by a grand jury on their oath.²² The only cases excepted from the opera-

21. *Ex parte Wilson*, 114 U. S. 417.

22. 1 Bishop, *Crim. Proc.*, Sec. 141.

tion of this amendment are those arising in the land and naval forces or the militia when in actual service. In order to preserve and enforce discipline, these cases are made punishable by courts-martial, the powers and limitations of which have already been sufficiently considered.

Twice in Jeopardy.—This amendment guarantees that no person for the same offense shall be twice put in jeopardy of life or limb. "Jeopardy of life or limb" is an old phrase which has come down from times when sanguinary punishments were common, but, as judicially interpreted, it simply means danger of punishment. A person is said "to have been put in jeopardy when a valid and sufficient indictment or information has been legally found against him and duly presented to a court of competent jurisdiction over both the person and the offense, and thereupon he has been arraigned and has pleaded, and a lawful jury has been empanelled and sworn to try the case and render a verdict."²³ From the foregoing it is apparent that one is not put in jeopardy by a prosecution in a court which has no jurisdiction of the case, or upon an indictment that is so defective that no judgment can be given upon it. And it has been held that jeopardy once attached is removed if the jury is discharged by reason of the impossibility of agreement or by consent, or if the case is stopped by the sickness or death of the judge or a juror,²⁴ or if after verdict of conviction it is set aside on motion of the accused, or judgment upon it is reversed by an appellate court.²⁵ But an acquittal, however erroneous, must be a bar to a second trial, unless a remedy by writ of error is given to the state by statute, as has been done in some States. The effect of this provision is to prevent a person from being twice tried for the same offense, but it is to be noticed that a single act may constitute two or more distinct offenses, as where a person com-

23. Black, Const. Law, p. 585.

24. *Hector v. State*, 2 Mo. 166.

25. *Casborus v. People*, 13 Johns, N. Y. 351.

mits an act which is at once a violation of a law of the United States and of a State, or where a person in the military service commits an act which is a violation of a law of the United States or of a State and which at the same time constitutes an offense against military discipline. In these cases, unless prohibited by statute, the person may be tried for each offense.

Witness against Himself.—No person, in any criminal case, shall be compelled to be a witness against himself. This provision of the Constitution is not limited to a criminal case against the party himself, but serves to prevent his being compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he had committed a crime.²⁶ A witness cannot avoid answering any question by the mere statement that the answer would tend to incriminate him, without regard to whether the statement is reasonable or not. And it is for the judge before whom the question arises to decide whether the answer thereto may reasonably have a tendency to incriminate the witness, or to furnish proof of an element or link in the chain of evidence necessary to convict him of a crime.²⁷ This provision was not intended to shield from the personal disgrace or opprobrium attached to the exposure of a crime, but only from actual prosecution and punishment. Hence, if a prosecution for the crime in which he is implicated is barred by the statute of limitations, or if he has already received a pardon for it, he may be compelled to answer.²⁸ But it does prevent the court from compelling the witness to submit to an examination of his person, to exhibit marks, scars, or deformities, to try on articles of clothing, to insert his feet into footprints, and the like;²⁹ it also prevents the seizure or com-

26. *Counselman v. Hitchcock*, 142 U. S. 547.

27. *Ex parte Irvine*, 74 Fed. R. 954.

28. *Brown v. Walker*, 161 U. S. 591.

29. *U. P. Ry. Co. v. Botsford*, 141 U. S. 250.

pulsory production of a man's private books or papers to be used in evidence against him. In the United States and most of the States the prisoner may take the stand in his own behalf. If he chooses to avail himself of this privilege, he may be cross-examined the same as other witnesses; but, if he does not, no inferences can be drawn from his omission to testify, with a view to influencing the finding of the jury.

Due Process of Law.—No person shall be deprived of his life, liberty, or property without due process of law. The Fourteenth Amendment extends this prohibition to the States. By this provision of the Constitution "life, liberty, and property are placed under the protection of known and established principles, which cannot be dispensed with, either generally or specially, either by courts or executive officers, or by legislators themselves. Different principles are applicable in different cases, and require different forms and proceedings: in some they must be judicial; in others the Government may interfere directly, and *ex parte*; but due process of law in each particular case means such an exertion of the powers of Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs. When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal, with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted." Due process of law must always mean more than a statute. An act of the legislature may be process of law, but it is not "due process" unless it conforms to the requirements of the Constitution and to the settled principles of right and justice.³⁰

30. Black, Const. Law, p. 481. See also the argument of Daniel Webster in the Dartmouth College Case, 4 Wheat. 518.

Private Property for Public Use.—Private property is not to be taken for public use without due compensation. Similar provisions are to be found in the Constitutions of the several States. When, under the power of eminent domain, private property is taken for public purposes, the proper compensation to be paid the owner thereof is to be determined by some fair and impartial tribunal, constituted for this purpose, but this tribunal is not necessarily a jury. In the performance of their duties the members of the tribunal are required to observe all the constitutional and statutory directions on this subject, and to endeavor to arrive at the fair and just value of the property taken, or the fair and just measure of its depreciation in consequence of the work or improvement in question. If only a part of the owner's property is taken and his remaining property is thereby directly injured or benefited, the damages are increased by the amount of the injury, or decreased by the amount of the benefit. It is usually provided that the damages shall be prepaid, especially if the property is taken for a private corporation, and that they must be paid in money. As to what constitutes a "taking," it may be said that it is not necessary that the owner should be entirely deprived or disseized of his estate, or that the property should be destroyed. If he is deprived of the ordinary, necessary, and beneficial use of his property, or if its value for such uses and purposes is directly and necessarily diminished, he is entitled to compensation.

Eighth Amendment.—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Bail, Fines, Punishments.—The bail here intended is that security which is given to secure their release by persons who are accused of crime and awaiting trial or final judgment, or who are held to keep the peace. By act of Congress, bail must be admitted upon all arrests in criminal cases except where the punishment may be death, and may be in such cases, but

only by the Supreme or a Circuit Court, or by a justice of the Supreme Court, or a judge of a Circuit or District Court, who must exercise their discretion whether to admit it or not, upon a consideration of the nature and circumstances of the offense, and of the evidence and usages of law.³¹ "That reasonable bail shall be accepted is an admonition addressed to the judgment and conscience of the court or magistrate empowered to fix the amount; it is impossible that a definite rule shall be established by law for particular cases. The principle, however, is this: That any bail is excessive which is greater than is needful to secure satisfactorily the attendance of the accused for trial or sentence, or the performance of such other obligation as may have been required of him."³² The prohibition as to fines is self-explanatory. That in respect to cruel and unusual punishments was simply intended to exclude all such barbarous punishments as torture, burning, branding, or mutilation. It does not apply to the ordinary methods of punishment, such as death by hanging, pecuniary fines, imprisonment, disfranchisement, or forfeiture of civil rights. What punishment is suited to a specified offense must in general be determined by the legislature, and the case must be very extraordinary in which its judgment can be brought in question. •

Section 3, Clause 1.—Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Treason.—This clause was intended as an additional safeguard against tyranny and injustice, and similar provisions are to be found in the constitutions of many of the States. Under

31. Rev. Stat., Secs. 1015-1016.

32. Cooley, Prin. Const. Law, p. 303.

its operation, conviction of and punishment for constructive treason are absolutely prevented. "By the ancient common law it was left very much to discretion to determine what acts were and were not treason; and the judges of those times, holding office at the pleasure of the crown, became but too often instruments in its hands of foul injustice. At the instance of tyrannical princes, they had abundant opportunities to create constructive treasons—that is, by forced and arbitrary constructions, to raise offenses into the guilt and punishment of treason which were not suspected to be such. The grievance of these constructive treasons was so enormous, and so often weighed down the innocent and the patriotic, that it was early found necessary for Parliament to interfere and arrest it by declaring and defining all the different branches of treason. It was under the influence of these admonitions, furnished by history and human experience, that the convention deemed it necessary to interpose an impassable barrier against arbitrary constructions, either by the courts or by Congress."³³

The Constitution mentions two classes of acts, and two only, which may constitute the crime: first, levying war against the United States; second, adhering to the enemies of the United States, giving them aid and comfort. As the offense is so aggravated and its consequences so terrible, more than ordinary certainty is required in the proof necessary to establish guilt; two witnesses must testify to the same overt act, or the accused must confess in open court. These provisions taken together require an overt or open act of levying war, or an open act of adherence to the nation's enemies, giving them aid and comfort; without one or the other there can be no treason.³⁴ A mere conspiracy by force to subvert the established Government is not treason; but there must be an actual levying of war. War, however, is levied when men are as-

33. Story, Constitution, Sec. 1797.

34. Pomeroy, Const. Law, Sec. 433.

sembled with the intent of effecting by force a treasonable purpose; and all persons who then perform any act, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered traitors.³⁵ And one is adherent to the enemies of his country, and giving them aid and comfort, when he supplies them with intelligence, furnishes them with provisions or arms, treacherously surrenders to them a fortress, and the like.³⁶ If overt acts are committed, they need not be successful to constitute giving aid and comfort.³⁷

Clause 2.—The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

Punishment of Treason.—It is well that Congress was given express power to declare the punishment of treason and to abandon the common-law punishment for this offense, which was cruel in the extreme. "The power has" been exercised by declaring death by hanging to be the punishment. The common law annexed other penalties to the crime of treason, viz.: corruption of blood and forfeiture of the estate of the attainted offender. Corruption of blood was the destruction of all inheritable qualities in the person, so that he could neither succeed as heir to any lands which might otherwise have come to him by descent, nor could other persons inherit from or through him. As the source, as the channel, and as the end of descent, his capacity was utterly gone. The Constitution has abandoned these ideas and the rules which they suggested. No attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. The attainder here spoken of is a judicial conviction of the crime. Bills of attainder were

35. *Ex parte Bollman*, 4 Cranch, 75, 126.

36. 4 Bl. Com. 76.

37. *U. S. v. Greathouse*, 2 Abb. U. S. 364

known to the English law and were legislative convictions; they are forbidden by express provisions of the Constitution, and the only possible attainder in the United States is a judgment of a competent court ascertaining and declaring the guilt of an accused person. Corruption of blood is entirely abolished; forfeiture of estate is permitted to a very limited extent."³⁸ By the confiscation acts of 1861 it was provided that no punishment or proceedings should be construed to work a forfeiture of the real estate of the offender longer than for the term of his natural life. The fee in such estates is not taken.

38. Pomeroy, Const. Law, Secs. 434-435.

CHAPTER VII.

MISCELLANEOUS.—ARTICLES IV., V., VI., AND VII. OF CONSTITUTION.

Article IV.

Section 1, Clause 1.—Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Full Faith and Credit.—Under this clause, what would otherwise be a rule of comity becomes a uniform rule of constitutional obligation; but even under it, and the legislation of Congress in pursuance thereof, the courts of one State are not required to take judicial notice of the public acts (that is, statutes), records, and judicial proceedings of another State; they must be proved as facts.¹ With regard to the manner in which they may be proved, Congress has provided that “the acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seal of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if

1. *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615

there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form; and the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.”² This law provides what shall be sufficient in all cases, but it does not prevent the States from making other regulations, not in conflict with these, for themselves, nor does it prevent making proof of records in common-law modes;³ nor does this law prescribe how the effect of such judgment in the State where rendered shall be shown; hence, the effect must be proved as a fact.⁴ A judgment rendered by a court of competent authority and having proper jurisdiction is conclusive on the merits in the courts of every other State, and when this judgment is made the basis of an action, the merits thereof cannot be inquired into.⁵ It is to be accorded the same faith and credit which it receives at home, and if valid there, it will be valid everywhere within the United States, and if binding on the parties at home, it is conclusive in all other courts in the Union.⁶ But the judgment of one State is not executory in another State—that is, it does not *per se* authorize the issue of final process or the exercise of auxiliary jurisdiction, but only when merged in a new judgment recovered in the second State.⁷ But a judgment can have no greater force abroad than at home, and therefore it is always competent to show that it is invalid for want of jurisdiction in the court rendering it.⁸ The party assailing the judgment may

2. Rev. Stat. U. S., Sec. 905.

3. *Gaines v. Rel*, 12 How. 472.

4. *Hanley v. Donoghue*, 116 U. S. 1.

5. *Mills v. Duryee*, 7 Cranch, 481.

6. *Armstrong v. Carson*, 2 Dall. 302.

7. *Claffin v. McDermott*, 12 Fed. 375.

8. *Harris v. Hardeman*, 14 How. 333.

also show that it has been set aside by the court rendering it, or reversed by an appellate court, or that it has been paid, released, or compromised. He may further show that the judgment as a cause of action is barred by the statute of limitation of the State where the judgment is sought to be enforced, if the statute is so framed as to include judgments.⁹ But he cannot impeach a judgment on the ground of any mere irregularity or upon any allegation that it is unjust or ill founded; and it seems also (though the point is not entirely free from doubt) that he cannot impeach a judgment on the ground of fraud in obtaining it, for he has an opportunity to make this defense, and must avail himself of it in the court which rendered the judgment.¹⁰ Process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon a non-resident to appear. Process sent to him out of the State and process published within are equally unavailing in proceedings to establish his personal liability.¹¹ But in respect to property within the State, a judgment rendered, with competent jurisdiction, against it is conclusive everywhere.¹²

Section 2, Clause 1.—The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Privileges and Immunities.—It would be impossible to state in any abstract definition all the rights and privileges which are comprehended within the meaning of this clause, and the Supreme Court has preferred not to attempt it, but to decide each case as it arises. It is safe to say, however, that “according

9. *McElmoyle v. Cohen*, 13 Pet. 312.

10. *Hanley v. Donoghue*, 116 U. S.; 1 Black, Const. Law, p. 251.

11. *Pennoyer v. Neff*, 95 U. S. 714, 727.

12. *D'Arcy v. Ketchum*, 11 How. 165.

to the express words and clear meaning of this clause, no privileges are secured by it but those which pertain to citizenship";¹³ and the term "citizens," as here used, applies only to natural persons, members of the body politic, owing allegiance to the State, and not to corporations, which are artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed. It is true that corporations are permitted to sue in the Federal courts on the assumption that their members are citizens of the State in which they have corporate being; but it has never been held that they are citizens in the sense here intended.¹⁴ The power of the States to control corporations must not, however, be understood as extending to corporations engaged in inter-State commerce, or to a corporation employed by the general Government in the transaction of its business. The following may, however, be said to be among the privileges secured by this clause of the Constitution: protection by the Government; the enjoyment of life and liberty, with the right to acquire, possess, and dispose of property of every kind, and to pursue and obtain happiness and safety, subject only to such restrictions as the Government may justly prescribe for the public good; the right of a citizen of one State to pass freely into, through, and out of all the other States, or to reside in any other State, for the purposes of trade, professional pursuits, or otherwise; the right to claim the benefit of the laws, either as a protection against injustice or as a means of enforcing his rights in its courts; and the right to be exempt from all discriminations and from any higher taxes, impositions, or other burdens than are paid by the citizens of the State.¹⁵

But this clause does not confer upon the citizens of each State the right of voting, of being elected, or of holding office in

13. *Conner v. Elliott*, 18 How. 591, 593.

14. *Cooley*, Const. Law, p. 196; *Paul v. Virginia*, 8 Wall. 168, 177, 188; *Pembina Mining Co. v. Penn.*, 125 U. S. 181.

15. *Ward v. Maryland*, 12 Wall. 418.

other States, since these are political privileges, which each State may justly reserve for its own citizens. A State could not, however, deny non-residents the right to acquire citizenship among its people, with all its attendant privileges, upon complying with prescribed requirements as to residence. Nor does this provision entitle the citizens of the various States to share in the common property of the citizens of a particular State—*e. g.*, the right of fishing in its navigable waters;¹⁶ nor does it prevent the requirement that non-resident plaintiffs shall furnish security for costs in actions commenced by them in the courts of the State.¹⁷ On the other hand, a statute which forbids the holding of land by a non-resident trustee is void, for if a person could be prevented from holding property in trust, it would be equally possible to prevent his holding it in fee.¹⁸ And a State cannot levy license or other taxes in such a way as to impose a heavier burden upon non-resident peddlers, salesmen, or traveling merchants than is borne by its own citizens in the same line of business,¹⁹ or in such a way as to discriminate in favor of its own citizens, against the introduction and sale of the manufactures or products of another State.²⁰

Clause 2.—A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

Inter-State Extradition.—It is now the generally accepted opinion that, independently of treaty stipulations, one nation

16. *McCready v. Virginia*, 94 U. S. 391.

17. *Holt v. Railroad Co.*, 81 Md. 219.

18. *Roby v. Smith*, 131 Ind. 342.

19. *Ward v. Maryland*, 12 Wall. 418.

20. *Walling v. Michigan*, 116 U. S. 446.

cannot claim, as a matter of general international law, that another should surrender up criminals fleeing from the justice of its laws; and it is claimed that, but for the above provision of the Constitution, the States would stand to each other in the same relation that independent nations now do under international law.²¹ If this doctrine is correct, the undoubted moral obligation which now rests upon the several States of the Union in this regard could scarcely be enforced, for, as we have seen, the States are forbidden to make treaties, and they cannot without the consent of Congress enter into any compact or agreement with each other.

Congress in 1793 assumed to define the duties of the States in this matter more explicitly than had been done in the Constitution itself. The provisions of the law then enacted have to do with the manner in which the fact of the commission of a crime must be shown and with the method of taking the fugitive into custody. Considering the constitutional and statutory provisions together, we may say that, to warrant the extradition of an alleged criminal, it is requisite, first, that he should be charged with the commission of a crime made punishable by the laws of the State demanding his surrender; second, that he should be a fugitive from the justice of that State; third, that his rendition should be demanded by the executive authority of that State; fourth, that the requisition should be accompanied by a copy of an indictment found against him, or an affidavit made before a magistrate charging him with having committed the crime alleged; fifth, that he should be arrested on the order or authorization of the executive authority of the State on which the requisition is made. In extradition proceedings both the Federal and State courts have jurisdiction to inquire, on *habeas corpus*, into the lawfulness of the custody in which the alleged criminal is held; but the courts will not, in general, overrule the

21. *Ex parte Knight*, 48 Ohio Stat., 588.

decisions of the Governor unless they are clearly satisfied that an error has been committed.²² "When the requisition is regular, and proceeds from the proper authority, and is accompanied by the necessary papers, in due and regular form, it is the duty of the Governor upon whom the requisition is made to surrender the fugitive; but this duty is left to his fidelity and moral sense; if he will not perform it, the courts have no power to compel him by *mandamus*, nor is there any other way in which he can be constrained."²³ Contrary to the general rule of treaties between independent nations, it is now settled that a person extradited from one State to another may be tried in the latter State, not only for the offense with which he was charged in the requisition papers, but for any and all criminal charges which that State may have against him. But, as is the case in international extradition, he is held for punishment for any offense he may have committed in the State where he has taken refuge before being given up to the authorities of the State from whose justice he is a fugitive.

Clause 3.—No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Fugitives from Labor.—This clause was intended to secure the return of fugitive slaves, escaping from one State into another. The abolition of slavery has, however, rendered it of little force or value, and space need not be consumed in dealing with the questions that arose under it.

Section 3, Clause 1.—New States may be admitted by the Congress into this Union; but no new State shall be

²² Robb v. Connolly, 111 U. S. 624.

²³ Black, Const. Law, p. 257; Kentucky v. Dennison, 24 How. 66.

formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Admission of New States.—The Constitution gives Congress power to admit new States into the Union, but it does not prescribe any rule as to the mode or manner of their admission, or place any limitations whatever upon the power of Congress to decide what territory shall be erected into States, so long as the boundaries of any existing States are not changed without the consent of their legislatures.²⁴ It is not to be supposed that Congress was to be limited in this regard to the domain which belonged to the United States at the time of the adoption of the Constitution, or that any particular rule was to be followed in the preparation of acquired territory for Statehood. As a matter of fact, large tracts have been acquired at different times from different nations, and from this and the territory first owned by the Government thirty-two new States have already been admitted. These acquired tracts have been usually organized into Territories and Territorial forms of government maintained for a time, but this is not essential. Texas was annexed and admitted directly as a State. The most usual method of admitting new States has been that in which Congress has first passed an enabling act, authorizing the people to form a Constitution, prescribing rules of suffrage and other conditions, and providing for the admission of the State when the Constitution shall be adopted and the conditions complied with. But States have been admitted where the people of a Territory of suitable size have, either by spontaneous action or in accordance with some Territorial statute or executive proclamation, formed

24. The case of West Virginia constitutes an apparent violation of this rule. For a statement of the doctrine on which its admission was based and justified, see *Virginia v. West Virginia*, 11 Wall. 39.

a Constitution, elected officers to administer it, and presented the Constitution to Congress and applied for admission under it. Congress has also, in considering a Constitution framed in one of the foregoing modes, accepted it conditionally, requiring the consent of the people to some condition precedent to admission, such as the consent to yield some portion of the territory claimed. But Congress could disregard these provisions, or impose entirely new ones, or waive any irregularities in the observance of the methods or conditions prescribed. These illustrations merely go to show the full and complete control Congress has over the admission of new States.

Clause 2.—The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

Government of the Territories.—Before the Spanish-American War the status of all the territory belonging to the United States and the rights of the inhabitants thereof seemed to be fairly well settled and understood; since that time, however, these questions have been opened anew and, so far at least as our newly-acquired possessions are concerned, it may be said that many points remain to be settled by the Supreme Court before we can with certainty define the relation of these territories to the general Government, and the civil rights and political status which their inhabitants may be said to enjoy.

For the first time in our history territory was acquired the majority of whose inhabitants are of a distinctly lower order of civilization than the people of the United States proper. To have admitted them to all the rights of citizens, or even to have promised the ultimate admission of these territories as States of the Union, would have been manifestly unwise, and the treaty

which provided for their cession was careful to prescribe that the civil and political rights of the inhabitants should be determined by Congress. Previous to these foreign acquisitions, it had always been popularly supposed that the power of Congress over the Territories was limited to holding them as such only until their population and resources entitled them to be admitted as States on an equality with the other States of the Union; but the Territories then held were settled by the same general class of people as was to be found in the States, and no question had ever been or could be raised to their admission on the ground of the character of their population. It thus happened that the power of the United States to hold territory and the power of Congress to govern it were never fully passed upon.

The Insular Cases.—So far, the new questions that have come before the Supreme Court for decision have been occasioned by the application of the tariff or revenue laws, but these decisions have turned largely upon the power of Congress over the territories, and serve to indicate the position the court will probably take in disposing of the further questions that are certain to arise. In *De Lima v. Bidwell*²⁵ it was held that, with the ratification of the treaty of peace between the United States and Spain, Porto Rico ceased to be foreign territory within the meaning of our tariff laws, and goods shipped from there to the United States ceased to be subject to taxation as imports. It was later held that goods sent from the United States to Porto Rico were not subject to taxation under existing laws,²⁶ and the same principles were held to apply to the Philippines.²⁷ But in May, 1900, the Foraker law was passed, providing for a small duty on goods shipped to Porto Rico from the United States and to the United States from Porto Rico. In taxing goods shipped from the United States the question was raised as to whether it

25. 182 U. S. 1.

26. *Dooley v. U. S.*, 182 U. S. 222.

27. *Fourteen Diamond Rings Case*, 183 U. S. 176.

was not a violation of the constitutional provision which prescribes that no duty shall be laid on goods exported from any State. The court referred to *Woodruff v. Parham*,²⁸ in which imports are defined as duties on goods imported from a foreign country, and held correlatively that exports are duties on goods shipped to a foreign country, and that, since Porto Rico had ceased to be foreign territory, the law was not in contravention of the Constitution on the ground mentioned.²⁹ In regard to the taxing of goods sent to Porto Rico from the United States, it was contended that this was a violation of the constitutional requirement that all "duties, imposts, and excises shall be uniform throughout the United States." The court held, however, that, although Porto Rico was domestic territory, it had not been incorporated into the Union and was not a part of the United States within the meaning of the clause in question.³⁰

Political Status of Inhabitants.—As to the political rights of the inhabitants of our new possessions, it can be said that those born before the ratification of the treaty of peace are not citizens of the United States, nor was it intended that they should be until Congress should see fit to make them so. As to whether those born after the ratification of the treaty are citizens under the Fourteenth Amendment remains to be decided; but as it has been held that these Territories are not a part of the United States within the meaning of the tariff clauses of the Constitution, it may also be held that they are not under the provision of the Fourteenth Amendment as to citizenship. It will be interesting to observe what the further decisions of the Supreme Court will be as to how far the rights guaranteed by the Constitution may be claimed by the residents of our new territories. But it is doubtless safe to assert at this time that the provisions for the protection of life, liberty, and property will

28. 8 Wall. 123.

29. *Dooley v. U. S.*, 183 U. S. 151.

30. *Downes v. Bidwell*, 182 U. S. 244

ever be as sacredly regarded there as elsewhere. A consideration of all the decisions of the Federal courts with regard to the power of Congress over the territories enables us to state the following

General Principles: (a) When territory is acquired by the United States, as it may be either by conquest or treaty, it comes under the absolute control of Congress except as to matters which have been regulated by the treaty of cession.

(b) As soon as the treaty of cession is ratified the acquired territory ceases to be foreign and becomes domestic and appurtenant, but it does not become a part of the United States within the meaning of its revenue laws, or within that clause of the Constitution which requires all "duties, imposts, and excises to be uniform throughout the United States," or perhaps within other provisions.

(c) When Congress, either by specific legislation or by legislation from which such an intent may be inferred, fully incorporates acquired territory into the Union, it then becomes a part of the United States to all intents and purposes; but merely political rights may even then be conferred on or withheld from the inhabitants thereof at the discretion of Congress.

(d) Congress may govern such territory in the manner it sees fit or as occasion may demand, subject only to the general limitations of the Constitution, applicable Congress in its relation to all territory and to all persons within the jurisdiction of the United States.

(e) The usual method of governing the Territories of the United States has been by local Territorial governments, organized as provided by laws of Congress, and consisting of an executive appointed by the President and Senate, and a legislature consisting of two houses, chosen by popular vote.

(f) Congress is the local legislature of the District of Columbia, and has full power to legislate for all other territory

within the jurisdiction of the United States. It may make a void act of a Territorial legislature valid or a valid act void.³¹

(g) The courts established by Congress for the Territories are not a part of the Federal judicial system—that is, they are not courts in which any part of the judicial power conferred by the Constitution can be vested. They are created solely under the power of Congress to govern the Territories, and Congress may by law provide for the proper disposal of all cases pending therein when the Territory is admitted as a State. Citizens resident in Territories are not citizens of a State within the meaning of the Constitution, and so cannot bring suit in the Federal courts against a citizen of a State.³²

(h) Whether or not a Territory shall be admitted as a State rests entirely within the discretion of Congress, and it is not a valid objection to the acquisition of territory that its population is not at the time of acquisition, or may never become, such as to entitle it to admission as a State.

Section 4, Clause 1.—The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

Republican Form of Government.—The United States guarantees to every State a republican form of government, but the particular form is not prescribed. At the time of the adoption of the Constitution the then-existing States had governments which were essentially republican in form—governments in which the people chose their own officers for public administration, and in which the laws were made by representative

31. *National Bank v. Yankton Co.*, 101 U. S. 129.

32. *Hepburn v. Ellzey*, 2 Cranch, 445.

bodies, whose legitimate acts were regarded as those of the people themselves. These governments were accepted precisely as they were, and it is presumed, therefore, that they were such as it was the duty of the States to provide. We are, then, furnished unmistakable evidence of what was "republican" in form within the meaning of the term as used in the Constitution.³³ Under this clause, when a new State is to be admitted to the Union, Congress sees to it that the form and Constitution of the government proposed to be adopted are republican, and the determination of Congress is final and conclusive. Once admitted, it may be said that "whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the Federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican features."³⁴

Changes in Form.—The existing republican form of government in any State may be changed by the hostile action of some foreign power taking military possession of the territory of a State and setting up some government therein not established by the people themselves; by the revolutionary action of the people themselves in forcibly rising against the constituted authorities and setting the government aside, or attempting to do so, for some other; or by changes made by the people of the State in strict conformity with the method prescribed for amending their Constitutions, the effect of which would be to deprive the State of its republican form. In any of these cases it would doubtless be the duty of the Federal Government to interfere and maintain a government in harmony with the Constitution. It thus becomes the duty of Congress to decide which is the established government in any State, for until it does this it cannot determine whether it is republican or not.³⁵ It was in the ex-

33. *Minor v. Happersett*, 21 Wall. 162.

34. *The Federalist*, No. 21.

35. *Luther v. Borden* 7 How 1

ercise of the power here granted that Congress at the close of the late Civil War provided for the reorganization and restoration of legitimate governments, republican in form, in the States which had passed ordinances of secession.

Domestic Violence.—The provision of this clause with regard to the protection of the several States against domestic violence brings an immense acquisition of strength to the aid of any State government in case of internal rebellion or insurrection against lawful authority. At the same time the requirement of a demand for aid takes away every pretext for intermeddling with the internal affairs of a State under color of protecting her against unlawful violence.

The Chicago Riots.—In 1894 there occurred a great strike of railroad employees, Chicago being the principal seat of disturbance. An attempt was made to prevent the movement of trains through that city. On the ground of protecting interstate commerce and the mails, President Cleveland, without the request and against the protest of Governor Altgeld, intervened and suppressed the rioting and disorder by the use of Federal troops. This action was fully sustained by the Supreme Court. It establishes the principle that Federal troops may be used at any time within the limits of any State, without the consent or authority of the executive thereof, for the purpose of suppressing disorders or riots which obstruct or interfere with the legitimate operations of the general Government.

Article V.

Section 1.—The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of

this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight, shall, in any manner, affect the first and fourth clauses in the ninth section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

Amendments.—Human foresight is not infallible, and it is impossible to provide at any time for all the exigencies which may arise in the future. A constitution, to be successful, therefore, must conform to the necessary changes made by progress and development in the political society which it governs. In prescribing methods of amendment the desideratum is to make them so difficult as to remove all temptation to frequent and unnecessary amendments, and at the same time to make them so simple that necessary reforms may be accepted and violent changes forestalled. This the Constitution has done by prescribing (*a*) that amendments may be proposed

1. By two-thirds of each House of Congress, or
2. By a convention called by Congress for this purpose at the request of the Legislatures of two-thirds of the several States;

and by prescribing (*b*) that amendments proposed by either method must be ratified

1. By the legislatures of three-fourths of the several States, or
2. By conventions in three-fourths thereof, according as one or the other mode of ratification is proposed by Congress.

The provision that “no State, without its consent, shall be deprived of its equal suffrage in the Senate” is now the one part of the Constitution which is practically unamendable.

In all, fifteen amendments to the Constitution have been adopted, and others have been proposed which failed of adoption; but all the amendments originated in Congress and were proposed by Congress to the States. "It may be regarded as a valuable tribute to the general excellency of the Constitution that no convention for its revision has ever been convened, nor, indeed, ever very seriously proposed, except at a time immediately before the Civil War, and when a settlement of existing controversies in that mode seemed to most people an impossibility."³⁶

Approval by President.—The question has been raised, "whether a proposed amendment is such an act of legislation as must be submitted to the President, before it goes to the State legislatures, for his approval, and whether he has the right to veto it. Executive and legislative precedent has settled this question in the negative, and considerations drawn from the wording of the Constitution lead to the same result."³⁷ Nor is the question of great practical importance, because the concurrence of two-thirds of both Houses of Congress is required to the proposing of amendments, and the same majority would be sufficient to overrule the President's veto, should one be interposed."³⁸

Article VI.

Section I.—All debts contracted and engagements entered into before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

Debts and Obligations.—It is a settled principle of international law that whenever a nation changes its form of govern-

36. Cooley, Prin. Const. Law, p. 210.

37. See *Hollingsworth v. Virginia*, 3 Dall. 378.

38. Black, Const. Law, p. 44.

ment, the new government is entitled to all the rights and privileges of the old and succeeds to all its obligations. The announcement in the Constitution of a determination to adhere to this settled rule may, therefore, be regarded as a solemn assurance to public creditors and the world that the public faith should be inviolably kept by the United States under its changed Government. A similar pledge was made in the Fourteenth Amendment, adopted after the close of the Civil War. It was here declared that "the validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void." The prohibitory part of this provision does not set forth or settle any new principle of law. No nation can be expected to or does compensate its enemies for their losses occasioned in war. But slaves were regarded as property, and since this property, of loyal and disloyal subjects alike, was destroyed by the Government by a method which was equivalent to an appropriation, it was contended that equitable claims to compensation should be respected. The prevailing view, however, was that slavery was itself the cause of the war with all its losses and calamities, that its destruction was the destruction of a public enemy, and that no just claim could arise from it. The compensation of such incidental losses was made impossible by an express prohibition.

Section 2.—This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound

thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

The Supreme Law.—The Constitution itself declares that it shall be the supreme law of the land, and it gives the same quality to the laws of Congress made in pursuance thereof, and to the properly ratified treaties of the United States. The Constitution must endure and be respected as the paramount law in every one of its provisions, at all times and under all circumstances, until changed by the prescribed method of amendment or destroyed by revolution. It is the measure of the power of Congress to legislate, and any enactment of Congress which is opposed to its provisions or is not within the grant of powers made by it is unconstitutional, and therefore no law, and obligatory upon no one.³⁹ As already explained, treaties, to be of any force or effect, must be in harmony with the Constitution, and where a law and a treaty of the United States are in irreconcilable conflict, the later in point of time will prevail. As previously explained also, a State law or constitution must yield to the supreme law, whether expressed in the constitution of the United States or in any of its valid laws and treaties, so far as they come in collision. In every State there must be some power which is supreme and to which all others in case of conflict must yield. And in such a Government as ours it will be easily seen that the recognized supremacy of the national and the subordination of the State governments are essential, not only to existence, but to the efficient exercise of any of the important functions of sovereignty.

Section 3.—The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution; but no

39. *Ableman v. Booth*, 21 How. 506.

religious test shall ever be required as a qualification to any office or public trust under the United States.

Oath of Office.—To more fully secure the supremacy of the Federal Government, all officers, national and State, are required to make an oath or affirmation to support the Constitution of the United States. This oath requires, in addition to the officer's personal obedience to the Constitution, that he will maintain its supremacy and inviolability against disruption by domestic intrigue or foreign aggression.

Religious Tests.—Most of the States, as well as the United States, have prescribed in their constitutions that no religious test shall be required as a qualification for holding public office; but this principle has not been universally adopted. In some of the States no man who denies the existence of a Supreme Being can hold office; in a few no preacher or minister of any religious denomination can be a member of the legislature; the further prohibition that no such preacher or minister shall hold the office of Governor is added in one State,* and any civil office is added in another.† But the wisdom of the rule as adopted for the United States is little questioned.

Article VII.

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Ratification of Constitution.—The Articles of Confederation provided that no change should be made in them "unless such alteration be agreed to in a Congress of the United States and be afterward confirmed by the legislature of every State." It is evident, therefore, that this plain provision was to be disregarded, and that in accepting the Constitution and abandoning their former organic law the people of the United States effected a quiet, political revolution. Their representatives, as has been

*Kentucky

†Delaware; see Stim. Am. St. Law, p. 54 §223.

seen, met to amend the Articles of Confederation, but, abandoning the hopeless task for which they had been called together, framed instead a new instrument of government. If unanimous consent had been required for its adoption, it is more than probable that it would never have gone into operation, and the wisdom of this Article is now, if it was not then, apparent to all. The question as to what would have been the status of any State or States which might have persisted in refusing to give assent to the Constitution is an interesting one, but one which we need not stop to discuss.

CHAPTER VIII.

AMENDMENTS TO THE CONSTITUTION.

Nature of the Amendments.—In considering the amendments to the Constitution that have been adopted it will be seen that they naturally arrange themselves in two classes, each of which by its subject-matter and purpose is distinctly referable to a particular period in the constitutional history of the country. "One class consists of those which impose limitations on the powers of the several departments of the Federal Government, with a view more completely to protect the liberties of the people and the reserved rights of the States; and the other is confined in the main to taking from the States the power to oppress particular classes of the people, to discriminate unjustly between classes, and to take away such rights as are fundamental. The first ten belong to one class, and the last three to the other."¹ The two amendments not here accounted for have already been considered. The eleventh merely imposes a restriction upon the Federal judicial power, and the twelfth makes a change in the manner of choosing the President and Vice-President.

The first ten amendments were adopted in consequence of an almost unanimous desire to secure additional safeguards from oppression at the hand of the Federal Government, which, in the change from the Articles of Confederation to the Constitution, had acquired an immense increase of power. This power, because remote from them, the people were led by their colonial experiences to distrust. Jealousy of centralization of power was an extremely strong sentiment, and it found expression in these amendments, in which it is declared that certain enumer-

1. Cooley, Const. Law, p. 207.

ated liberties of the people shall not be taken away or abridged; that the enumeration in the Constitution of certain rights should not be construed to deny or disparage others retained by the people; and that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, were reserved to the States respectively, or to the people. These are in the nature of, and are often referred to as, a bill of rights.

The last three amendments were rendered necessary by the events of the Civil War, and the desire to prevent the possibility of any similar conflict in the future. Their design was to secure the utter and final abolition of slavery throughout the United States and all territory subject to its jurisdiction, and to secure to the newly emancipated race the same privileges of citizenship and of personal and political rights which were previously enjoyed by all others under the Constitution.

Article I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Religion.—It will be recalled that the original Constitution declares that no religious test shall ever be required as a qualification to any office or public trust under the United States. The amendment now under consideration further extends the guarantee of religious freedom by providing that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” But both these provisions apply only to Congress. No attempt was made, either in the Constitution or the amendments, to protect the religious liberty of the people against their respective State governments.

"By establishment of religion is meant the setting up or recognition of a state Church, or at least the conferring upon one Church of special favors and advantages which are denied to others." Congress is prohibited ever to legislate with regard to such an establishment or to prevent the free exercise of religion; but this does not mean that Congress may not recognize the existence of religion, or "that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the workings of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects. . . . But the freedom of religion cannot be extended to prevent the punishment of crimes. Polygamy and bigamy are none the less crimes because encouraged by the teachings of a religious sect. To call their advocacy a tenet of religion is to offend the common sense of mankind."²

Freedom of Speech and of the Press.—Since this provision does not undertake to create any new rights, but only to protect those already possessed by the people, we must have recourse to the law as it existed at the time of the adoption of the Constitution in order to ascertain what rights and privileges may be claimed under this clause. By the common law one who publishes libelous attacks upon another, with malicious intent to do him injury, is amenable to the criminal law, and there is also a liability in damages to the party injured. So also blasphemous publications, and those that tended by their obscenity or indecency to debauch the minds of the public and corrupt their morals, were punishable. The above guarantee does not change these rules in any particular, and, since it applies only to the Federal Government, it follows that the States may enforce the provisions of their common or statutory law so as fully to prevent or punish any abuse of the constitutional privilege

2. Cooley, Const. Law, p. 214; *Davis v. Beason*, 133 U. S. 333; *Reynolds v. U. S.*, 98 U. S. 145.

of freedom of speech or of the press. It is doubtless competent also for Congress, within the territory subject to the exclusive jurisdiction of the United States, or with respect to subjects committed to its exclusive care, to enact laws looking to the punishment of the abuse of this privilege in any form, so long as no attempt is made to place a prior restraint upon its exercise. Thus the act of Congress prohibiting the use of the mails for the transmission of obscene matter is not unconstitutional as being in contravention of this amendment.³ But while it is true that in general a person for his utterances remains liable criminally and also in damages to the party injured, there are certain exceptions found in the case of what are known as "privileged communications."

Privileged Communications.—These are of two classes, absolute and conditional. The absolute privilege exempts from all responsibility, without any consideration of motive or design, and attaches to statements made in the line of their duty by members of the legislative bodies, the principal officers of the executive branch of the Government, and participants in judicial proceedings. The conditional privilege protects the person in case his statement, though unfounded in fact, was made for proper ends and from justifiable motives. It attaches to published reports of judicial proceedings, to criticisms of public officers, of candidates for public office, of courts and judges, and of literary compositions.⁴

Rights of Assembly and Petition.—The right of the people peaceably to assemble and to petition the Government for a redress of grievances is so essential to a free government that it would, no doubt, be regarded as inherent in the nature of our republican institutions, even if it had not been made the express subject of a constitutional guarantee. This prohibition is laid

3. *U. S. v. Harmon*, 45 Fed. 414.

4. *Black, Const. Law*, pp. 548-9.

only upon Congress, and as a protection against Federal action alone. But as the right of the people to assemble and petition Congress for a redress of grievances or for anything else connected with the powers and duties of the national Government is an attribute of national citizenship, it is doubtless within the power of the United States to protect this right from interference from any source whatever.⁵ But this right to assemble and to petition the Government must be exercised peaceably. Assemblies must not be for unlawful purposes and must not be tumultuous or riotous in their character, and petitions must not be of a seditious nature nor accompanied by any parade of force or show of intimidation or threats.

Article II.

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

Right to Bear Arms.—This is a natural right, not created or granted by the Constitution, and the Second Amendment means no more than that it shall not be denied or infringed by Congress or the other departments of the national Government. It places no restrictions upon the power of the several States. Hence, unless restrained by their own Constitutions, the State legislatures may enact laws to control and regulate all military organizations, and the drilling and parading of military bodies and associations, except those which are authorized by the militia laws or the laws of the United States.⁶ The “arms” here meant are those of a soldier. They do not include dirks, Bowie knives, and such other weapons as are used in brawls, fights, and riots. The right to bear arms is not infringed by a State law prohibiting the carrying of concealed deadly weapons. Such a law is a police regulation, and is justified by the fact

5. See *U. S. v. Cruikshank*, 92 U. S. 542.

6. *Presser v. Illinois*, 116 U. S. 252.

that the practice forbidden endangers the peace of society and the safety of individuals.⁷

Article III.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, but in a manner to be prescribed by law.

Quartering of Soldiers.—The quartering of soldiers in private houses has always been a subject of just complaint whenever and wherever it has been resorted to. The memory of such oppressions was fresh in the minds of the people when the Declaration of Independence was made, and they then denounced what they prohibited by this amendment. A resort to the quartering of troops on private families is generally justified on the plea of necessity; but this plea can never be a truthful one in time of peace, and if the necessity is likely to arise in time of war, it is only just that it should be provided for by laws which will keep within proper limits the exercise of a privilege so unusual and so burdensome to the citizen. It is proper to add that this protection has no application, in time of war, to the enemies of the country.

Article IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Search Warrants.—This provision of the Constitution was doubtless inserted under the apprehension that the official power of the Federal Government might be abused by the issue of what were known as "general warrants." These were warrants

7. Black, Const. Law, p. 463.

issued in a general form, authorizing the officers to search all suspected places and seize all suspected persons, and their illegality consisted in the fact that no individual was named or described, and that no specific description of the place to be searched or the things to be seized was given. Although plainly in violation of private rights and the spirit of the common law, these warrants had been much used in England, and they were not unknown in the Colonies.

In general, it may be said that the citizen is here protected against all unauthorized intrusion into his dwelling-house by officers or others claiming to act under the authority of the law; against the compulsory production of his books and papers to be used as evidence against him; against the unlicensed examination of the contents of letters or sealed packages intrusted by him to the Government for transmission through the mails; against the search of his house for specific property alleged to be therein; or in aid of the enforcement of the criminal laws or police regulations, except it be under the authority of a search-warrant lawfully issued, and complying with all constitutional and statutory requirements.⁸ The Constitution provides that no warrant shall issue for the arrest of a person or the seizure of goods, except where probable cause, supported by oath or affirmation, is shown, and that the warrant when issued must particularly describe the place to be searched, the goods to be seized, or the person to be arrested; and a similar provision is made a part of the organic law of every State. A man assaulted in his dwelling is not obliged to "flee to the wall," but he may defend his home, which is his castle of refuge, to any and all extremities. But the privacy of the dwelling will not be allowed to stand in the way of the due execution of the laws, nor can it be made a sanctuary for those who are amenable to the criminal justice of the State. An officer of the law may force

8. Black, Const. Law, p. 500.

an entry into a private house for the purpose of arresting a felon, or in order to arrest a person known to be in hiding there, for treason, felony, or breach of the peace; or the house may be entered and the owner evicted when he is no longer entitled under the law to hold possession; when it is necessary to destroy the house in order to prevent the spread of fire; and in certain cases under the quarantine laws. There are certain cases, also, in which a person may be arrested without a warrant. For instance, anyone may arrest another whom he sees committing or attempting to commit a felony or forcible breach of the peace; and a peace officer may arrest, on reasonable ground of suspicion of felony; but the person arrested must be at once taken before some court or magistrate of competent jurisdiction to take cognizance of the offense.

The Fifth, Sixth, Seventh, and Eighth Amendments have been considered in Chapter VI., in connection with the jurisdiction of the Federal courts (see page 170 *et seq.*).

Article IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Purpose of Ninth and Tenth Amendments.—The first eight amendments provide that certain enumerated liberties of the people shall not be taken away or abridged, and the ninth, in order to prevent inferences being drawn in favor of the power of the Government and against the rights of the people, declares that “the enumeration in the Constitution of certain rights

shall not be construed to deny or disparage others retained by the people."

The tenth establishes the principle that the Government of the United States is one of delegated and limited powers, and that those powers which are not confided to it by the Constitution nor prohibited thereby to the States are reserved to the States respectively or to the people. This is to be understood as declaring that any power not conferred by the Constitution upon the Federal Government nor prohibited by that instrument to the States is reserved to the people to be by them conferred upon their several State governments or not, as they see fit; and, as the people constitute the ultimate source of sovereignty and power, it is evident that, in the form of an amendment to the Constitution, they can at will take from the powers already conferred upon the Federal Government or add to them at the expense of the powers now exercised by the States, or those which the people have reserved to themselves.

The Eleventh Amendment has been considered in Chapter VI. (see page 169), and the Twelfth Amendment in Chapter V. (see page 133).

Article XIII.

Section 1.—Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2.—Congress shall have power to enforce this Article by appropriate legislation.

Abolition of Slavery.—As has been seen, the original Constitution recognized the existence of slavery, though references to it are in the most obscure and guarded terms. Whether or not slavery should continue to exist was regarded as a matter wholly of domestic concern within each State, and one with

which the Federal Government had no authority to interfere. Thus, although condemned by a large majority of the people of the United States, it continued to exist until as a military measure the emancipation of the slaves was proclaimed by President Lincoln, January 1, 1863. This proclamation was made real by the progress of the armies of the North through the insurgent territory. Finally the adoption of the Thirteenth Amendment assured its perpetual abolition throughout all the domain of the United States. The meaning of this amendment is so clear that very few legal controversies have arisen under it, and the expression "involuntary servitude" has occasioned most of the judicial interpretation that the courts have been called upon to give. It was doubtless added to prevent the establishment of any system of compulsory service, though limited perhaps to a term of years, such as Mexican peonage, the padrone system of Italy, or the Chinese coolie labor system. As remarked by the Supreme Court, while Negro slavery alone was in the minds of the Congress which framed the Thirteenth Amendment, it forbids any other kind of slavery now or hereafter.⁹ But it was then necessary to make an exception, allowing involuntary servitude as a punishment for crime, in order not to deprive the States of the power to sentence convicts to labor in the penitentiaries.

Article XIV.

Section 1.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor

9 Slaughter-house Cases 16 Wall 36 Miller J.

deny to any person within its jurisdiction the equal protection of the laws.

Citi ens.—As has been observed, the original Constitution nowhere defines citizenship or declares who shall be considered citizens of the United States. As a consequence, it was contended by many able statesmen that there was no such thing as national citizenship except as it resulted from State citizenship. This point, though doubtless incorrect, was rendered immaterial by the first section of the Fourteenth Amendment. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are by it declared to be citizens of the United States and of the State in which they reside. The distinction between citizenship of the United States and citizenship of a State is here clearly recognized and established. Not only may a person be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within a State to be a citizen of it, but it is only necessary that he should be born or naturalized within the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.¹⁰ A State cannot naturalize foreigners and make them citizens of the United States, although it may clothe them with certain privileges of its own citizenship. The United States can convert aliens into citizens, but it cannot make them citizens of a particular State. This depends upon their own choice; they become citizens of that State in which they reside.

Citi-enship; How Acquired.—Citizenship of the United States results from birth or naturalization. As will have been inferred from previous discussions, mere birth within our ter-

10. Slaughter-house Cases, 16 Wall. 36.

ritory does not always make a child a citizen; he must be born under the allegiance of the United States. A child may be a citizen, though born without the United States, if born within its allegiance—as, for instance, the child of a citizen traveling or temporarily sojourning abroad; or a child of an American minister, consul, or the attaché of an American embassy; or a child born on an American ship in foreign waters of American parents. So children of aliens, born under similar circumstances within the limits of the United States, are not citizens thereof; but children born of alien parents permanently residing in the United States are citizens under the common-law doctrine that anyone born within the territory and allegiance of the king or country is a natural-born citizen. From this it follows that, although the Chinese cannot be naturalized under our laws, children born of Chinese parents permanently resident in the United States are citizens;¹¹ and for the same reason children born of American citizens permanently resident abroad are not citizens of the United States. Indians are not citizens.¹² For a full understanding of who are and who are not citizens under our naturalization laws, see the Revised Statutes.¹³

Privileges or Immunities.—The States are forbidden to abridge the privileges or immunities of citizens of the United States, but what these are the amendment does not define. As was remarked in discussing the “privileges and immunities of citizens in the several States,” it is impossible to frame any definition that will cover all cases, and no such general definition has been attempted.

What Not Included.—But first it may be said the right of suffrage is not included. The right to vote is not conferred or guaranteed by the Federal Constitution, but is left to be fixed

11. *Lem Hing Dun v. U. S.*,¹ 7 U. S. App. 31; *In re Look Tin Sing*, 21 Fed. 905.

12. *U. S. v. Kagama*, 118 U. S. 375.

13. Secs. 2168, 2172, 1994, 1977, 1978, 2169.



and regulated by the several States, subject, however, to the limitations contained in the Fourteenth and Fifteenth Amendments. So also the right of marriage, the right of the descent of property, the right to the control of children, the right to sue for property and to have it protected, and, in general, the protection of life, liberty, and the pursuit of happiness are all founded in the relation between the State and its citizens, and are not rights which belong to citizens of the United States as such.¹⁴

What Included.—But the rights which they do possess in that character are also numerous and important, though it is clear that they must have some relation to the legitimate operations of the general Government, to the purposes for which it was created, or to the powers which are committed to it.¹⁵ For instance, it has been laid down that it is the right of a citizen of the United States “to come to the seat of Government to assert any claim he may have upon that Government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all the operations of foreign commerce are conducted; to the sub-treasuries, land offices, and courts of justice in the several States.”¹⁶ It is also his right to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government; to peaceably assemble and petition the Government for a redress of grievances; to have the benefit of the writ of *habeas corpus*, and the rights secured to our citizens by treaties with foreign nations; to use the navigable waters of the United States, however they may penetrate the territory of the several States; to become a citizen of any State by a *bona fide* residence therein;

14. Black, Const. Law, p. 531.

15. Kirtland v. Hotchkiss, 100 U. S. 491.

16. Crandall v. Nevada, 6 Wall. 35.

to have the benefit of the patent and copyright laws and the advantages of the postal system; to take advantage of the bankrupt laws, etc., and all this without any abridgment, hindrance, or taxation by the States.¹⁷

Life, Liberty, or Property.—The States are by this amendment forbidden to deprive any person of life, liberty, or property without due process of law. The meaning of the expression “due process of law” has already been considered in discussing a similar limitation laid upon the Federal Government by the Fifth Amendment. (See page 178.) What was said there applies with equal force here, and need not be repeated.

Equal Protection of the Laws.—No State shall deny to any person within its jurisdiction the equal protection of the laws. While it is true that the Fourteenth Amendment was primarily intended to secure the rights and the equality before the law of the colored race, its language is so broad as to apply equally to any class or race of persons and to protect them against all invidious state discriminations. It is not even limited to citizens of the United States, but may be claimed by aliens lawfully resident in a State, if “within its jurisdiction,”¹⁸ and the word “person” as here used includes corporations.¹⁹

Cases Under This Provision.—This provision does not operate to prevent a State from enacting local or special laws, such as a law providing for trial by jury in some parts of the State and not in others, or a law which classifies property and which subjects different classes to different modes and methods of ascertaining the value and different provisions as to the right of appeal, so long as these laws apply equally to all persons in the same circumstances.²⁰ It is carefully to be borne in mind

17. See the Slaughter-house Cases, 16 Wall. 36; *Logan v. U. S.*, 144 U. S. 263.

18. *Yick Wo v. Hopkins*, 118 U. S. 356.

19. *Santa Clara Co. v. S. P. Ry. Co.*, 118 U. S. 394.

20. *Kentucky Railroad Tax Cases*, 115 U. S. 321.

that it is not identity, but equality of rights and privileges, which this amendment guarantees. Thus, while a State could not exclude Negro children from the benefits of the public schools on account of their color only,²¹ it can establish separate schools for colored children, and require them to attend those schools or none, provided the accommodations, opportunities, etc., are fully equal to those provided for white children.²² And a railroad company or other common carrier may provide separate cars and waiting-rooms for colored people, so long as the accommodations are equal for all who pay at the same rate.²³ A State statute cannot exclude colored citizens, because of their race or color, from serving on grand or petit juries;²⁴ but a colored person, under the equal protection of the laws, is not entitled, as a matter of right, to have a jury for his trial composed wholly or partly of colored men.²⁵ The right to labor is clearly a right covered by this amendment, and a State statute which prohibits corporations or natural persons from employing certain kinds of labor—as, for instance Chinese or Mongolian—is therefore unconstitutional and void.²⁶ But for the welfare of society the conduct of certain kinds of business, or the qualifications of those who may be allowed to pursue them, may be regulated by the State in the exercise of its police power. Thus many of the incidents of the business of railroad companies and other common carriers and that of inn-keepers are under the control and regulation of the States, and, so long as such regulation and control applies equally to all persons in the same circumstances, the parties affected cannot claim that they are deprived of the equal protection of the laws.²⁷ And, unless

21. *Davenport v. Cloverport*, 72 Fed. 689.

22. *Claybrook v. City of Owensboro*, 16 Fed. 297.

23. *Plessy v. Ferguson*, 163 U. S. 537.

24. *Strauder v. West Virginia*, 100 U. S. 303.

25. *Virginia v. Rives*, 100 U. S. 313.

26. *In re Parrott*, 1 Fed. 481.

27. *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155

prohibited by the State constitution, a grant by the State legislature of a monopoly in any of the ordinary and common trades or callings is not void; it is not void under the Constitution, according to the decisions of the Supreme Court, as abridging the privileges and immunities of citizens of the United States, or depriving them of a portion of their liberty (the right to pursue their happiness in the prosecution of a lawful calling) without due process of law, or denying to them the equal protection of the laws.²⁸ But opinions on this question have never been unanimous. In most of the States, however, we find more or less rigid restrictions upon the grant or creation of monopolies. Finally, a State may impose an annual license tax, or other conditions, on foreign corporations admitted to do business within its limits; for though a corporation is a person within this amendment, it is not "within the jurisdiction" of a State until it has complied with the conditions prerequisite to the right to enter its field, and until this is done the corporation cannot claim the benefit of the equal protection of the State's laws.²⁹

Thus it will be seen that while the Fourteenth Amendment was primarily designed to secure for colored citizens an equality of rights and the equal protection of the laws, not all and perhaps not a majority of the cases which have arisen under it have been occasioned by a denial to colored persons of the privileges guaranteed.

Section 2.—Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or

28. *Butcher's Union Slaughter-house Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 763.

29. *Pembina, etc., Co. v. Pennsylvania*, 125 U. S. 181.

the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Purpose of this Clause.—The purpose of the above clause was to secure the right of suffrage to colored citizens. It will be observed, however, that under the operation of the Fourteenth Amendment a State might still disqualify as voters all its colored citizens, but that it would suffer as a penalty a reduction in its basis of representation in the proportion which the whole number of male citizens of the United States twenty-one years of age so disqualified would bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.—No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

This section is practically self-explanatory. Its effect in creating qualifications for office and the action of Congress in removing disabilities under it have been sufficiently noticed elsewhere. (See page 49.)

Section 4.—The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

This section has been sufficiently discussed in connection with Article VI., Section 1. The student is referred to the treatment there given. (See page 200.)

Section 5.—The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Enforcement of Fourteenth Amendment.—The Fourteenth Amendment gives to Congress the power to enforce its provisions by appropriate legislation. But it has been held that the legislation authorized is not direct or primary legislation on the matters with respect to which limitations are imposed upon the States, but corrective legislation, such as may be necessary or proper for counteracting or redressing the effect of State laws or acts.³⁰ Accordingly, an act of Congress, commonly known as the "Civil Rights Act," was declared unconstitutional and void, except in so far as it applied to places under the exclusive control of the United States, because it attempted to secure, by direct measures to all citizens, regardless of race or color, equal advantages and accommodations in inns, public conveyances, places of amusement, etc.³¹

30. See Black, Const. Law, p. 466.

31. Civil Rights Cases, 109 U. S. 3.

Article XV.

Section 1.—The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2.—The Congress shall have power to enforce this article by appropriate legislation.

The Fifteenth Amendment.—This amendment does not give colored citizens the right to vote, but it does prevent their disqualification on account of race, color, or previous condition of servitude. Any qualification which may be prescribed as a condition to the exercise of the right of suffrage will not, therefore, be in contravention of this amendment, provided it operates on all alike, even though its effect is to secure the disfranchisement of colored citizens. But even where a State, by prescribing proper qualifications for its voters, causes the disfranchisement of any considerable number of male citizens of the United States twenty-one years of age, it is still apt to incur the penalty of reduction in its representation, prescribed in the Fourteenth Amendment.

A Word to the Student.—A thorough and conscientious study of the Constitution of the United States is earnestly recommended. Its principles and precepts should be faithfully observed, and no departure therefrom should be made by any citizen or officer, high or low, of our Government. It has secured to us more than a century of union and prosperity; and, if the plan of government which it established be carefully adhered to, and the checks and balances which it provides be not disregarded by departmental usurpations of power, we have good reason to hope that our republican form of government will prove perpetual, and will secure to its citizens to the end of time the matchless privileges and benefits we now enjoy.

APPENDICES.

I.

Two Hundred Constitutional Recreations.

II.

The Declaration of Independence.

III.

The Articles of Confederation.

IV.

Resolutions and Letter Transmitted to Congress
by the Federal Convention.

V.

Washington's Farewell Address.

APPENDICES.

I.

TWO HUNDRED CONSTITUTIONAL RECREATIONS.

1. Define "constitution."
2. Into what two general classes may constitutions be divided? To which class does our Constitution belong?
3. What is the essential difference between the two classes?
4. When did the Constitutional Convention meet? Where? Who was its presiding officer? Name five prominent characters who were members of the Convention.
5. In what year was the Constitution adopted?
6. When did the Government under it go into operation? Where was the first seat of Government? The second?
7. What power has the House and what the Senate in regard to impeachment? Give nine different provisions of the Constitution on the subject of impeachment.
8. How many senators must concur in order to convict on impeachment? When the President of the United States is tried, who presides? Are senators required to be on oath or affirmation when sitting as a court of impeachment?
9. What is the limit beyond which judgment in cases of impeachment may not extend? Does a conviction on impeachment prevent trial and punishment according to law?
10. Who may be impeached? Is a senator or representative liable to impeachment? What is the authority for your answer? For what offenses may an officer be impeached?
11. Have there been many cases of impeachment under the United States? Many convictions? Has a President ever been impeached?
12. How often is Congress required to assemble? What does the expression "a congress" mean? How many sessions

to each Congress? Is the number always the same? Explain long and short sessions, and what causes the difference.

13. What provision is made in the Constitution with reference to the times, places, and manner of holding elections for senators and representatives?

14. State the rule prescribed by Congress for the election of senators.

15. What is the composition of the Senate? How are senators chosen? Is the method uniform in all the States?

16. How is the Senate divided? What is the purpose of this division? Is the Senate a continuing body? What are the qualifications prescribed for a senator?

17. How is a vacancy in the Senate filled? May it be filled temporarily by appointment? If so, how long would such appointee hold office?

18. Who is the presiding officer of the Senate? Does he have a vote? When is a President *pro tempore* chosen?

19. May a senator or representative who possesses all the constitutional qualifications be rejected on other grounds by the House to which he is elected? If so, what clause of the Constitution furnishes authority for so doing?

20. What is a quorum of either House? What powers may a smaller number exercise?

21. Name twelve of the powers expressly granted to Congress.

22. What is the rule which governs the levying of duties, imports, and excises? Define each of these terms.

23. Distinguish between direct and indirect taxes. What is the present ruling of the Supreme Court as to what are direct taxes? What did the early decisions on this question hold?

24. What is the rule for levying direct taxes? Is an income tax direct or indirect?

25. Has the United States a general and unlimited power of taxation? Explain.

26. On what ground has the constitutionality of the tariff laws of the United States been questioned?

27. Name two or more things which have been done by Congress under its power to borrow money.

28. Name ten subjects to which the power to regulate commerce has been applied?

29. What constitutes inter-State commerce? Can such commerce be taxed by the States? Give a reason for your answer.

30. In the case of an article grown or manufactured in a State, but intended for shipment to another State or to a foreign country, when does the quality of inter-State or foreign commerce attach to it so as to prevent its taxation by the State in which it was produced?

31. In the case of an article shipped into one State from another, when does it cease to be inter-State commerce and become subject to taxation?

32. Explain when goods in the hands of an importer can and cannot be taxed by a State as a part of the general mass of property in the State.

33. What is naturalization? What is expatriation? Is the right of expatriation recognized by the United States? Is it recognized by other nations?

34. Give the substance of the naturalization laws of the United States. Is the privilege of naturalization limited to persons of any particular race or color? Is any class or race excluded from this privilege?

35. What is a bankrupt law? Has the United States ever exercised its authority to make such laws?

36. When is a bankrupt law uniform? What are exemptions?

37. What constitutes coining money? May the States coin money?

38. What does the expression "regulating the value of money" mean? What action has been taken by Congress to regulate the value of foreign coin?

39. What has been done by Congress under its authority to regulate the standard of weights and measures?

40. What are some of the principal causes for the failure of the general Government under the Articles of Confederation?

41. Recite the Preamble to the Constitution.
42. Name the three great departments created by the Constitution.
43. What is the composition of Congress?
44. What is the composition of the House of Representatives?
45. Who prescribes the qualifications of those who may vote for representatives?
46. Are these qualifications necessarily the same in every State?
47. May a person be eligible to election as a representative who, under the laws of his State, might not be qualified to vote for one?
48. What are the qualifications prescribed by the Constitution for a representative?
49. How long must a naturalized foreigner be a resident of the United States before he can be elected a representative?
50. How are representatives apportioned among the several States? What else is apportioned according to the same rule?
51. Since the adoption of the Fourteenth Amendment, who are counted in determining the population of a State? Who were counted before this amendment was adopted?
52. When was the first enumeration of the people of the United States made? How often has an enumeration been made since that time? When was the latest one made?
53. What is the present number of representatives? What is the maximum authorized by the Constitution?
54. According to the rule at present in force, how are the following determined: (a) The total number of representatives? (b) The basis of representation? (c) The number to which any State is entitled?
55. Have the Territories any representation in Congress? If so, what are such representatives called and what are their functions?
56. How are vacancies in the representation from any State filled?

57. Who is the presiding officer of the House of Representatives? How is he chosen?

58. To what did the expression "three-fifths of all other persons" refer?

59. What power is granted by the Constitution with regard to making rules of procedure, and the punishment of members? Does the two-thirds necessary to expel a member of either House mean two-thirds of a quorum or two-thirds of all the members?

60. Give the provision of the Constitution with regard to keeping and publishing a journal of proceedings by each House. What is the purpose of the provision with regard to the publishing of the yeas and nays?

61. Would it require an amendment to the Constitution to change the day on which Congress meets?

62. For how long may either House alone adjourn? Would it be proper for Congress to adjourn to meet at any other place than Washington?

63. What Government pays the senators and representatives? What is the salary of each?

64. What is the liability of a member of Congress for any speech or debate? To what cases does their privilege from arrest not extend?

65. Give a good reason why the power to coin money was denied to the States.

66. Can Congress provide by law a punishment for circulating counterfeit coin?

67. Can a State punish the circulation of counterfeit coin? On what theory?

68. Name some of the things which have been done by Congress under its power "to establish post-offices and post-roads."

69. What is a patent? A copyright?

70. What are the essentials of a patentable invention?

71. Give the substance of the patent and copyright laws of the United States.

72. Can a senator or representative by resigning make himself eligible to appointment to an office under the United

States which has been created during the time for which he was elected? Can he ever be appointed to such an office?

73. Where must bills for raising revenue originate? Define such a bill. Could a bill providing for the sale of public lands originate in either House?

74. What is necessary to make a bill a law? Give three different ways in which a bill may become a law.

75. What is the pocket veto? When was this first made use of to any extent?

76. What good purpose does the veto power of the President serve? Is the President in any way limited as to the reasons for which he may veto a bill?

77. Give two ways in which a bill may become a law without the President's signature. What is the reason for requiring every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) to be submitted to the President for his approval?

78. Define "piracy" as the term is understood at international law. Has Congress added to or subtracted from this definition? Under what authority?

79. How would you define "piracy" under the statutes of the United States?

80. What are felonies? Why is it fitting that Congress should have been given power to punish felonies committed on the high seas?

81. What are offenses against the laws of nations? Give a good reason for not entrusting the punishment of such offenses to the States.

82. To whom is given the power to declare war? May war occur without a previous declaration?

83. What are letters of marque and reprisal? May a State grant them? Why?

84. What is the purpose of rules concerning captures on land and water?

85. To what department is the power to raise and support armies given? What does this power include?

86. Give the constitutional provision in regard to the appropriation of money for the support of armies.

87. What is the effect of this provision upon the Executive? What upon Congress?

88. For what time may money for the support of the Navy be appropriated?

89. Give the clauses of the Constitution which authorize the establishment of (a) the Military Academy, (b) the Naval Academy, (c) the Post-office Department.

90. Define "bill of attainder." What is an *ex post facto* law? Are all *ex post facto* laws retrospective? Are all retrospective laws *ex post facto*? Explain. To whom are such laws forbidden?

91. What provisions of the Constitution authorize the use of courts-martial for the trial and punishment of offenses committed by persons in the military or naval service?

92. What is the purpose of the Articles of War? Under what authority are they enacted?

93. To whom does the Constitution give authority to call out the militia? What is the language of this grant? Define "militia."

94. What are the purposes for which the militia may be called out?

95. Who actually calls out the militia in cases warranting it? Under what authority?

96. What authority do the States retain over the militia? Does the Constitution recognize or define a national militia? What is the authority of Congress for enacting a Militia Bill?

97. Over what places may the United States exercise exclusive legislation?

98. What is the implied limitation on both the Federal and State Governments with regard to taxation?

99. Does the grant of an express power imply the grant of such auxiliary powers as are necessary to make the express grant effective? Are the powers of the Federal Government limited to those expressly granted?

100. What is the writ of *habeas corpus*? What is the "privilege" of the writ?

101. When may the latter be suspended? Who may suspend it? In what cases may the writ be issued by the Federal courts?

102. What is a capitation tax? According to what rule must it be levied?

103. What is said in the Constitution about taxing exports? What is a duty on exports?

104. Is a tax on goods shipped from New York to Porto Rico a tax on exports? Why?

105. How is money drawn from the Treasury? What can you say of the importance of this provision?

106. The King of England wishes to confer a title or decoration upon an officer of the United States Navy. Can the officer accept it? What would be the case of a citizen?

107. Name seven things which the States are specifically forbidden to do.

108. May a State enter into a treaty, alliance, or confederation? Assign a good reason for the rule.

109. Define "bill of credit," "legal tender." What are the restrictions laid upon the States in regard to them?

110. What are known as the "Legal Tender Acts"? Under what authority did Congress enact them?

111. If a State law or Constitution impairs the obligation of a contract, what is the result? May Congress pass laws which impair the obligation of contracts? If so, explain its authority for so doing. When is the obligation of a contract said to be impaired?

112. Explain the power of the States to tax imports and exports. What becomes of the net produce of such taxation? Why?

113. Define "duty of tonnage," and state what is said in the Constitution about such duty.

114. May a State keep troops in time of peace? What troops are here referred to?

115. What is the rule with regard to agreements or compacts between States?

116. Suppose a State is actually invaded or in imminent danger thereof, may it raise troops to resist such invasion without first obtaining the consent of Congress?

117. In what is the judicial power of the United States vested? How are United States judges appointed to office? How long do they serve? What is the provision in regard to their salary? What is its purpose?

118. To what does the judicial power of the United States extend?

119. State the two general classes into which these subjects may be divided, and state what jurisdiction depends upon in each class. State generally the reason for placing each class of cases within the jurisdiction of the United States.

120. Name the courts belonging to the Federal judicial system; name the United States courts not belonging to that system.

121. Define "jurisdiction," "original jurisdiction," "appellate jurisdiction," "exclusive jurisdiction," and "concurrent jurisdiction."

122. Define "case," as used in the Constitution.

123. In what cases has the Supreme Court original jurisdiction? Is this exclusive or concurrent? In what cases has it exclusive original jurisdiction?

124. What is the extent of the appellate jurisdiction of the Supreme Court?

125. Name the provisions of the Constitution with regard to trial by jury.

126. When a crime is not committed within any State, where may it be tried?

127. In whom is the executive power of the United States vested?

128. What is the present method of choosing the President and Vice-President? In what respects does it differ from the old method? What made the change desirable?

129. Can both the President and Vice-President be chosen from the same State? What consideration would prevent any political party from taking its candidates for President and Vice-President both from the same State?

130. Compare the original purpose of the Electoral College with that which by custom and usage it now serves. What brought about the change? Of what is it a good illustration?

131. How is the manner of choosing electors determined? On what day are they chosen? On what day do they give their vote? On what day is their vote counted?

132. Who may be President of the United States? May a person born of parents who were American citizens and residing abroad be elected President? Under what circumstances? Explain fully.

133. In what ways may the office of President become vacant? Who succeeds to his office? Give the order of succession now established by law of Congress. For what time does one who succeeds to the office of President serve?

134. What are the provisions of the Constitution with regard to the salary of the President? What is the purpose of these provisions?

135. Who is the Commander-in-chief of the Army and Navy? By what authority does he hold this position?

136. Explain the double relation which the President bears to the Army and Navy.

137. In calling the militia into the actual service of the United States, to whom may the President issue his orders? Suppose a militia officer should refuse to obey such orders, how may he be punished?

138. Give the two instances in the Constitution where reference is made to what we now know as the Cabinet.

139. In what department is the power of granting reprieves and pardons vested? Define "reprieve," "pardon." What is the one case to which the pardoning power does not extend?

140. Where is the treaty-making power of the United States vested? What are the advantages of so vesting it?

141. What does the term "levying war," as used in the definition of "treason," mean?

142. How may a conviction of treason be secured? What is the provision of the Constitution with regard to the punishment of treason?

143. What does the expression "corruption of blood" mean?

144. How are the public acts, records, and judicial proceedings of one State proved in another? What is their effect when so proved?

145. On what grounds may a judgment secured in one State be attacked in another?

146. May such a judgment be enforced in the second State without being merged in a new judgment?

147. Define "bribery," "treason."

148. How are public officers of the United States appointed? In whom may the appointment of inferior officers be vested? Who are inferior officers within the meaning of the Constitution?

149. How is the filling of vacancies that happen during the recess of the Senate provided for? How long may such appointees hold office? May they be reappointed?

150. What is the purpose of the President's messages? How are they communicated? Are special messages ever sent?

151. What is the duty of the Executive with regard to the execution of the laws? Must he execute a law as he finds it, or may he decline to execute it because he thinks it unconstitutional?

152. Who receives ambassadors and other public ministers? Give the status and functions of an ambassador.

153. What are some of the "privileges and immunities of citizens in the several States"?

154. Is the right to vote included?

155. Explain how a fugitive from justice of one State who has taken refuge in another may be secured for trial.

156. What can you say of the obligation resting upon the Governor of one State to deliver up fugitives from the justice of another?

157. In order to warrant extradition, must the offense charged be a crime in the State where the offender has taken refuge?

158. What is the usual method of procedure in admitting a Territory to statehood? What are the restrictions with regard to the admission of new States?

159. How are the Territories belonging to the United States governed?

160. What can you say of the status of the inhabitants of acquired territory? What of the power of Congress to legislate for the territory of the United States?

161. What is declared to be the supreme law of the land?

162. Suppose a law of Congress or a treaty conflicts with the Constitution, what is the result?

163. In case there is irreconcilable conflict between a law of Congress and a treaty, which will prevail?

164. Suppose a State law or constitution conflicts with the Constitution, a law of Congress, or a treaty, what is the result? Does it make any difference which was first enacted?

165. Name the classes of officers who are bound by oath or affirmation to support the Constitution.

166. What is the practically unamendable provision of the Constitution?

167. What is the rule of international law concerning the duties and obligations of a State which changes its form of government? What is the provision of the Constitution which declared the intention of the Government to observe this rule when it abandoned the Articles of Confederation?

168. What is meant by the expression "freedom of speech or of the press"?

169. Does the constitutional provision in regard thereto give a person the privilege of saying or publishing what he pleases without danger of prosecution for slander or libel?

170. Give the provisions of the Constitution with regard to the Militia.

171. Name the war powers of Congress.

172. Is a law prohibiting the carrying of concealed weapons a violation of the constitutional provision that "the right of the people to keep and bear arms shall not be infringed"?

173. Give the provision of the Constitution with regard to the quartering of troops in private houses. What led to the insertion of this guarantee?

174. How is the security of the dwelling-house guaranteed?

175. Can a person's papers and effects be forcibly seized to be used in evidence against him?

176. What must be shown before a warrant will issue by a Federal court or judge? What must the warrant set forth?

177. Is it lawful for the United States to use force within the limits of a State without the request of its legislature or Governor to suppress rioting or disorder which interferes with the legitimate operations of the Federal Government?

178. What are the methods prescribed for amending the Constitution? State fully.

179. In what way may the government of a State be changed so as to warrant the interference of the United States to maintain a government in harmony with the Constitution? What is the standard for determining what is republican in form?

180. Explain the meaning of the restriction on Congress as to laws respecting an establishment of religion or prohibiting the free exercise thereof. Does this clause prevent the punishment of an act which the person doing it claims is a part of his religion, but which is an offense against the law or the moral sense of the community?

181. What is the substance of the Thirteenth Amendment? What was it intended to prevent?

182. To what government do the restrictions of the first ten amendments apply? Those of the last three?

183. Who are citizens of the United States? Is a child born within the jurisdiction of the United States of alien parents a citizen? Explain. Does his race or color make any difference?

184. What are the privileges and immunities of citizens of the United States which the States are forbidden to abridge? Is the right of suffrage among these? Is the right to choose one's residence?

185. What is included in the "equal protection of the laws"?

186. What is the purpose of the Fourteenth Amendment? Of the Fifteenth?

187. Does the Fifteenth Amendment confer on colored citizens the right to vote? Explain.

188. Why was the so-called "Civil Rights Act" unconstitutional?

189. Is it a violation of the Fourteenth Amendment for a State to provide separate schools for colored and white children? Or for a railroad company to provide separate cars and waiting-rooms for white and colored persons? What must be the nature of the accommodations furnished?

190. Define the police power of a State. Can the Legislature divest itself of this power or grant it to individuals or corporations?

191. Give the authority of Congress for the enactment of the following laws: (a) excluding the Chinese, (b) creating an Inter-State Commerce Commission, (c) creating national banks, (d) making paper money legal tender, (e) prescribing a uniform for mail-carriers.

192. Under what power was Alaska acquired? Porto Rico? The Philippines?

193. Suppose a properly ratified treaty involves the payment of money; discuss the obligation of the House of Representatives to vote the appropriation for its payment.

194. What are the arguments in favor of a single presidential term of seven years with ineligibility to re-election? Those in favor of the present arrangement?

195. Suppose a proper police regulation of a State should indirectly affect inter-State commerce; would it be valid or invalid? Suppose it affects it so directly as to amount to a regulation thereof?

196. What is the exception to the rule that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury? Define "presentment," "indictment." What was the composition of a grand jury at common law? What is it under the United States statutes?

197. Define "due process of law." What would this comprise in a criminal trial? Under what right can private property be taken for public use? How is the proper compensation determined?

198. What is the meaning of the expression "jeopardy of life or limb"? When is a person said to be in jeopardy? When jeopardy has once attached, may it be removed? If so, how? What does the Constitution guarantee to an accused person in the matter of the nature and cause of the accusation, witnesses for and against him, and counsel for his defense?

199. What is prescribed as to the re-examination of a fact tried by a jury? What was the common-law method of re-examining facts once tried by a jury?

200. When is a question said to be incriminating? Who determines finally whether a given question is incriminating or not? If punishment for the offense of which the witness may be guilty is barred by the statute of limitations, will he be excused from answering on the ground of incriminating himself?

A DECLARATION BY THE REPRESENTATIVES OF THE UNITED
STATES OF AMERICA, IN CONGRESS ASSEMBLED.

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But, when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these Colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having, in direct object, the estab-

lishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world:

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature; a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the State remaining in the meantime exposed to all the danger of invasion from without and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislature.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us;

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States;

For cutting off our trade with all parts of the world;

For imposing taxes on us without our consent;

For depriving us, in many cases, of the benefits of trial by jury;

For transporting us beyond seas to be tried for pretended offenses;

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies;

For taking away our charters, abolishing our most valuable laws, and altering fundamentally the powers of our governments;

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny already begun, with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undisputed destruction of all ages, sexes, and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant is unfit to be the ruler of a free people.

Nor have we been wanting in attention to our British brethren.

We have warned them from, time to time, of attempts made by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them as we hold the rest of mankind—enemies in war; in peace, friends.

We, therefore, the representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these Colonies, solemnly publish and declare that these United States are, and of right ought to be *free and independent States*; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as FREE AND INDEPENDENT STATES, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which INDEPENDENT STATES may of right do. And, for the support of this declaration, with a firm reliance on the protection of DIVINE PROVIDENCE, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

JOHN HANCOCK.

New Hampshire.

JOSIAH BARTLETT,
WILLIAM WHIPPLE,
MATTHEW THORNTON.

Massachusetts Bay.

SAMUEL ADAMS,
JOHN ADAMS,
ROBERT TREAT PAINE
ELBRIDGE GERRY.

Rhode Island.

STEPHEN HOPKINS,
WILLIAM ELLERY.

Connecticut.

ROGER SHERMAN,
SAMUEL HUNTINGTON,
WILLIAM WILLIAMS,
OLIVER WOLCOTT.

New York.

WILLIAM FLOYD,
PHILIP LIVINGSTON,
FRANCIS LEWIS,
LEWIS MORRIS.

New Jersey.

RICHARD STOCKTON,
JOHN WITHERSPOON,
FRANCIS HOPKINSON,
JOHN HART,
ABRAHAM CLARK.

Pennsylvania.

ROBERT MORRIS,
BENJAMIN RUSH,
BENJAMIN FRANKLIN,
JOHN MORTON,
GEORGE CLYMER,
JAMES SMITH,
GEORGE TAYLOR,
JAMES WILSON,
GEORGE ROSS.

Delaware.

CÆSAR RODNEY,
GEORGE READ,
THOMAS M'KEAN.

Maryland.

SAMUEL CHASE,
WILLIAM PACA,
THOMAS STONE,
CHARLES CARROLL,
of Carrollton.

Virginia.

GEORGE WYTHE,
RICHARD HENRY LEE,
THOMAS JEFFERSON,
BENJAMIN HARRISON,
THOMAS NELSON, JR.,
FRANCIS LIGHTFOOT LEE,
CARTER BRAXTON.

North Carolina.

WILLIAM HOOPER,
JOSEPH HEWES,
JOHN PENN.

South Carolina.

EDWARD RUTLEDGE,
THOMAS HEYWARD, JR.,
THOMAS LYNCH, JR.,
ARTHUR MIDDLETON.

Georgia.

BUTTON GWINNETT
LYMAN HALL,
GEO. WALTON.

ARTICLES OF CONFEDERATION

And perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

ARTICLE I. The style of this Confederacy shall be "THE UNITED STATES OF AMERICA."

ARTICLE II. Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled.

ARTICLE III. The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State; and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively; provided, that such restriction shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States, or either of them.

If any person guilty of or charged with treason, felony, or other high misdemeanor in any State shall flee from justice and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed, in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the Committee of the States.

In determining questions in the United States in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonment during the time of their going to and from and attending on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign

state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled with any king, prince, or state in pursuance of any treaties already proposed by Congress to the Courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary, by the United States in Congress assembled, for the defense of such State or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only as, in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State: but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred; and shall provide and constantly have ready for use, in public stores, a due number of field-pieces, and tents and a proper quantity of arms, ammunition, and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ship or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. When land forces are raised by any State for the common defense, all officers of or under the rank of colonel shall be appointed by the legislature of each State respectively, by whom such forces shall be raised, or in such manner as such State shall direct; and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in Congress assembled shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the Sixth Article: of sending and receiving ambassadors: entering into treaties and alliances; provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever: of establishing rules for deciding, in all cases, what captures on land or water shall be legal; and in what manner prizes, taken by land or naval forces in the service of the United States, shall be divided or appropriated: of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining, finally, appeals in all cases of captures; provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort, on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more States

concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given, by order of Congress, to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot, and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination. And if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or, being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive. And if any of the parties shall refuse to submit to the authority of such court, or to appear, or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being, in either case, transmitted to Congress and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the Supreme or Superior Court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward": pro-

vided also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States whose jurisdictions, as they may respect such lands and the States which passed such grants, are adjusted, the said grants, or either of them, being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States: fixing the standard of weights and measures throughout the United States: regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State within its own limits be not infringed or violated: establishing and regulating post-offices, from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office: appointing all officers of the land forces in the service of the United States, excepting regimental officers: appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States: making rules for the government and regulation of the land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee to sit in the recess of Congress, to be denominated "A Committee of the States," and to consist of one delegate from each State, and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction: to appoint one of their number to preside; provided that no person be allowed to serve in the office of President more than one year in any term of three years: to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses: to

borrow money or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted: to build and equip a navy: to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding; and thereupon the legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldierlike manner, at the expense of the United States; and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than its quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State; unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same; in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared: and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war; nor grant letters of marque and reprisal in time of peace; nor enter into any treaties or alliances; nor coin money, nor regulate the value thereof; nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them; nor emit bills; nor borrow money on the credit of the United States; nor appropriate money; nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised; nor appoint a commander-in-chief of the Army or Navy; unless nine States assent to the same; nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the

United States, so that no period of adjournment be for a longer duration than the space of six months; and shall publish the journal of their proceedings monthly, except such parts thereof, relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

ARTICLE X. The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada, acceding to this Confederation and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of this Union; but no other Colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII. All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every State shall abide by the determinations of the United States in Congress assembled on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State; and the Union shall be perpetual. Nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States and be afterwards confirmed by the legislatures of every State.

AND WHEREAS, It hath pleased the Great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress, to approve of and to authorize us to ratify the said Articles of Confederation and perpetual Union: Know ye that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents that they shall abide by the determinations of the United States in Congress assembled on all questions which by the said Confederation are submitted to them; and that the Articles thereof shall be inviolably observed by the States we respectively represent; and that the Union shall be perpetual. In witness whereof, we have hereunto set our hands in Congress. Done at Philadelphia, in the State of Pennsylvania, the 9th day of July, in the year of our Lord 1778, and in the 3d year of the Independence of America.

IV.

IN CONVENTION, MONDAY, SEPTEMBER 17, 1787.

Present: The States of New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

Resolved, That the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention that it should afterwards be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification; and that each convention assenting to and ratifying the same should give notice thereof to the United States in Congress assembled.

Resolved, That it is the opinion of this Convention that as soon as the conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the States which shall have ratified the same, and a day on which the electors should assemble to vote for the President, and the time and place for commencing proceedings under this Constitution; that after such publication the electors should be appointed, and the senators and representatives elected; that the electors should meet on the day fixed for the election of the President, and should transmit their votes certified, signed, sealed, and directed as the Constitution requires, to the Secretary of the United States in Congress assembled; that the senators and representatives should convene at the time and place assigned; that the senators should appoint a President of the Senate, for the sole purpose of receiving, opening, and counting the votes for President; and that, after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute this Constitution.

By the unanimous order of the Convention.

GEORGE WASHINGTON, *President.*

WILLIAM JACKSON, *Secretary.*

IN CONVENTION, SEPTEMBER 17, 1787.

SIR,—We have now the honor to submit to the consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable.

The friends of our country have long seen and desired that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the General Government of the Union; but the impropriety of delegating such extensive trust to one body of men is evident: hence results the necessity of a different organization.

It is obviously impracticable, in the Federal Government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered and those which may be reserved, and on the present occasion this difficulty was increased by a difference among the several States as to their situation, extent, habits, and particular interests.

In all our deliberations on this subject we kept steadily in our view that which appears to us the greatest interest of every true American—the consolidation of our Union—in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid on points of inferior magnitude than might have been otherwise expected; and thus the Constitution which we now present is the result of a spirit of amity and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.

That it will meet the full and entire approbation of every State is not, perhaps, to be expected; but each will doubtless consider that, had her interest been alone consulted, the consequences might have been particularly disagreeable or injurious to others; that it is liable to as few exceptions as could reasonably have been expected, we hope and believe; that it may promote

the lasting welfare of that country so dear to us all, and secure her freedom and happiness, is our most ardent wish.

With great respect, we have the honor to be, sir, your excellency's most obedient humble servants.

By unanimous order of the Convention.

GEORGE WASHINGTON, *President*.

His Excellency the PRESIDENT OF CONGRESS.

V.

WASHINGTON'S FAREWELL ADDRESS TO THE PEOPLE OF THE
UNITED STATES, SEPTEMBER 17, 1796.

Friends and Fellow-Citizens:

The period for a new election of a citizen to administer the executive Government of the United States being not far distant, and the time actually arrived when your thoughts must be employed in designating the person who is to be clothed with that important trust, it appears to me proper, especially as it may conduce to a more distinct expression of the public voice, that I should now apprise you of the resolution I have formed, to decline being considered among the number of those out of whom a choice is to be made.

I beg you, at the same time, to do me the justice to be assured that this resolution has not been taken without a strict regard to all the considerations appertaining to the relation which binds a dutiful citizen to his country, and that in withdrawing the tender of service which silence in my situation might imply, I am influenced by no diminution of zeal for your future interest, no deficiency of grateful respect for your past kindness, but am supported by a full conviction that the step is compatible with both.

The acceptance of and continuance hitherto in the office to which your suffrages have twice called me have been a uniform sacrifice of inclination to the opinion of duty and to a deference for what appeared to be your desire. I constantly hoped that it would have been much earlier in my power, consistently with motives which I was not at liberty to disregard, to return to that retirement from which I had been reluctantly drawn. The strength of my inclination to do this previous to the last election had even led to the preparation of an address to declare it to you; but mature reflection on the then perplexed and critical posture of our affairs with foreign nations, and the unanimous advice of persons entitled to my confidence, impelled me to abandon the idea.

I rejoice that the state of your concerns, external as well as internal, no longer renders the pursuit of inclination incompatible with the sentiment of duty or propriety; and am persuaded, whatever partiality may be retained for my services, that, in the present circumstances of our country, you will not disapprove my determination to retire.

The impressions with which I first undertook the arduous trust were explained on the proper occasion. In the discharge of this trust I will only say, that I have with good intentions contributed towards the organization and administration of the Government the best exertions of which a very fallible judgment was capable. Not unconscious in the outset of the inferiority of my qualifications, experience in my own eyes, perhaps still more in the eyes of others, has strengthened the motives to diffidence of myself; and every day the increasing weight of years admonishes me more and more that the shade of retirement is as necessary to me as it will be welcome. Satisfied that, if any circumstances have given peculiar value to my services, they were temporary, I have the consolation to believe, that while choice and prudence invite me to quit the political scene, patriotism does not forbid it.

In looking forward to the moment which is intended to terminate the career of my public life, my feelings do not permit me to suspend the deep acknowledgment of that debt of gratitude which I owe to my beloved country, for the many honors it has conferred upon me; still more for the steadfast confidence with which it has supported me, and for the opportunities I have thence enjoyed of manifesting my inviolable attachment by services faithful and persevering, though in usefulness unequal to my zeal. If benefits have resulted to our country from these services, let it always be remembered to your praise, and as an instructive example in our annals, that, under circumstances in which the passions, agitated in every direction, were liable to mislead, amidst appearances sometimes dubious, vicissitudes of fortune often discouraging, in situations in which not unfrequently want of success has countenanced the spirit of criticism, the constancy of your support was the essential prop of the efforts, and a guarantee of the plans, by which they were effected. Profoundly penetrated with this idea, I shall carry it with me to my grave, as a strong incitement to unceasing vows, that heaven may continue to you the choicest tokens of its beneficence; that

your union and brotherly affection may be perpetual; that the free Constitution, which is the work of your hands, may be sacredly maintained; that its administration in every department may be stamped with wisdom and virtue; that, in fine, the happiness of the people of these States, under the auspices of liberty, may be made complete by so careful a preservation and so prudent a use of this blessing as will acquire to them the glory of recommending it to the applause, the affection, and adoption of every nation which is yet a stranger to it.

Here, perhaps, I ought to stop; but a solicitude for your welfare, which cannot end but with my life, and the apprehension of danger natural to that solicitude, urge me, on an occasion like the present, to offer to your solemn contemplation and to recommend to your frequent review some sentiments which are the result of much reflection, of no inconsiderable observation, and which appear to me all-important to the permanency of your felicity as a people. These will be offered to you with the more freedom, as you can only see in them the disinterested warnings of a parting friend, who can possibly have no personal motive to bias his counsel; nor can I forget, as an encouragement to it, your indulgent reception of my sentiments on a former and not dissimilar occasion.

Interwoven as is the love of liberty with every ligament of your hearts, no recommendation of mine is necessary to fortify or confirm the attachment.

The unity of government, which constitutes you one people, is also now dear to you. It is justly so, for it is a main pillar in the edifice of your real independence; the support of your tranquillity at home, your peace abroad; of your safety; of your prosperity; of that very liberty which you so highly prize. But, as it is easy to foresee that, from different causes and from different quarters, much pains will be taken, many artifices employed to weaken in your minds the conviction of this truth; as this is the point in your political fortress against which the batteries of internal and external enemies will be most constantly and actively (though often covertly and insidiously) directed, it is of infinite moment that you should properly estimate the immense value of your National Union to your collective and individual happiness; that you should cherish a cordial, habitual, and immovable attachment to it; accustoming yourselves to think

and speak of it as of the palladium of your political safety and prosperity; watching for its preservation with jealous anxiety; discountenancing whatever may suggest even a suspicion that it can, in any event, be abandoned; and indignantly frowning upon the first dawning of every attempt to alienate any portion of our country from the rest, or to enfeeble the sacred ties which now link together the various parts.

For this you have every inducement of sympathy and interest. Citizens, by birth or choice, of a common country, that country has a right to concentrate your affections. The name of AMERICAN, which belongs to you in your national capacity, must always exalt the just pride of patriotism, more than any appellation derived from local discriminations. With slight shades of difference, you have the same religion, manners, habits, and political principles. You have, in a common cause, fought and triumphed together; the independence and liberty you possess are the work of joint councils and joint efforts, of common dangers, sufferings, and successes.

But these considerations, however powerfully they address themselves to your sensibility, are greatly outweighed by those which apply more immediately to your interest. Here every portion of our country finds the most commanding motives for carefully guarding and preserving the union of the whole.

The North, in an unrestrained intercourse with the South, protected by the equal laws of a common Government, finds, in the productions of the latter, great additional resources of maritime and commercial enterprise and precious materials of manufacturing industry. The South, in the same intercourse, benefiting by the agency of the North, sees its agriculture grow and its commerce expand. Turning partly into its own channels the seamen of the North, it finds its particular navigation invigorated; and while it contributes in different ways to nourish and increase the general mass of the national navigation, it looks forward to the protection of a maritime strength to which itself is unequally adapted. The East, in like intercourse with the West, already finds, and in the progressive improvement of interior communications by land and water will more and more find, a valuable vent for the commodities which it brings from abroad or manufactures at home. The West derives from the East supplies requisite to its growth and comfort; and, what is perhaps of

still greater consequence, it must of necessity owe the secure enjoyment of indispensable *outlets* for its own productions to the weight, influence, and the future maritime strength of the Atlantic side of the Union, directed by an indissoluble community of interest as *one* nation. Any other tenure by which the West can hold this essential advantage, whether derived from its own separate strength or from an apostate and unnatural connection with any foreign power, must be intrinsically precarious.

While, then, every part of our country thus feels an immediate and particular interest in union, all the parts combined cannot fail to find in the united mass of means and efforts greater strength, greater resource, proportionately greater security from external danger, a less frequent interruption of their peace by foreign nations; and, what is of inestimable value, they must derive from union an exemption from those broils and wars between themselves which so frequently afflict neighboring countries not tied together by the same governments; which their own rivalships alone would be sufficient to produce, but which opposite foreign alliances, attachments, and intrigues would stimulate and embitter. Hence, likewise, they will avoid the necessity of those overgrown military establishments which, under any form of government, are inauspicious to liberty, and which are to be regarded as particularly hostile to republican liberty; in this sense it is that your union ought to be considered as a main prop of your liberty, and that the love of the one ought to endear to you the preservation of the other.

These considerations speak a persuasive language to every reflecting and virtuous mind, and exhibit the continuance of the Union as a primary object of patriotic desire. Is there a doubt whether a common Government can embrace so large a sphere? Let experience solve it. To listen to mere speculation in such a case were criminal. We are authorized to hope that a proper organization of the whole, with the auxiliary agency of governments for the respective subdivisions, will afford a happy issue to the experiment. It is well worth a fair and full experiment. With such powerful and obvious motives to union, affecting all parts of our country, while experience shall not have demonstrated its impracticability, there will always be reason to distrust the patriotism of those who, in any quarter, may endeavor to weaken its bands.

In contemplating the causes which may disturb our Union, it occurs, as matter of serious concern, that any ground should have been furnished for characterizing parties by geographical discriminations—Northern and Southern, Atlantic and Western: whence designing men may endeavor to excite a belief that there is a real difference of local interests and views. One of the expedients of party to acquire influence within particular districts is to misrepresent the opinions and aims of other districts. You cannot shield yourselves too much against the jealousies and heartburnings which spring from these misrepresentations; they tend to render alien to each other those who ought to be bound together by fraternal affection. The inhabitants of our western country have lately had a useful lesson on this head; they have seen in the negotiation by the Executive and in the unanimous ratification by the Senate of the treaty with Spain, and in the universal satisfaction at that event throughout the United States, a decisive proof how unfounded were the suspicions propagated among them of a policy in the general Government and in the Atlantic States unfriendly to their interests in regard to the Mississippi: they have been witnesses to the formation of two treaties—that with Great Britain and that with Spain—which secure to them everything they could desire in respect to our foreign relations, towards confirming their prosperity. Will it not be their wisdom to rely, for the preservation of these advantages, on the Union by which they were procured? Will they not henceforth be deaf to those advisers, if such there are, who would sever them from their brethren and connect them with aliens?

To the efficacy and permanency of your Union, a government for the whole is indispensable. No alliances, however strict, between the parties, can be an adequate substitute; they must inevitably experience the infractions and interruptions which all alliances, in all times, have experienced. Sensible of this momentous truth, you have improved upon your first essay by the adoption of a Constitution of government better calculated than your former for an intimate Union and for the efficacious management of your common concerns. This Government, the offspring of our own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a pro-

vision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. The basis of our political systems is the right of the people to make and to alter their constitutions of government; but the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all. The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.

All obstructions to the execution of the laws, all combinations and associations, under whatever plausible character, with the real design to direct, control, counteract, or awe the regular deliberation and action of the constituted authorities, are destructive of this fundamental principle and of fatal tendency. They serve to organize faction, to give it an artificial and extraordinary force; to put in the place of the delegated will of the nation the will of a party, often a small but artful and enterprising minority of the community; and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill-concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans, digested by common counsels and modified by mutual interests.

However combinations or associations of the above description may now and then answer popular ends, they are likely, in the course of time and things, to become potent engines by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government; destroying afterwards the very engines which had lifted them to unjust dominion.

Towards the preservation of your Government and the permanency of your present happy state, it is requisite not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretext. One method of assault may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly over-

thrown. In all the changes to which you may be invited, remember that time and habit are at least as necessary to fix the true character of governments as of other human institutions; that experience is the surest standard by which to test the real tendency of the existing constitution of a country; that facility in changes, upon the credit of mere hypothesis and opinion, exposes to perpetual change from the endless variety of hypothesis and opinion; and remember especially, that for the efficient management of your common interests, in a country so extensive as yours, a government of as much vigor as is consistent with the perfect security of liberty is indispensable. Liberty itself will find in such a government, with powers properly distributed and adjusted, its surest guardian. It is, indeed, little else than a name where the government is too feeble to withstand the enterprises of faction, to confine each member of the society within the limits prescribed by the laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property.

I have already intimated to you the danger of parties in the State, with particular reference to the founding of them on geographical discriminations. Let me now take a more comprehensive view, and warn you, in the most solemn manner, against the baneful effect of the spirit of party generally.

This spirit, unfortunately, is inseparable from our nature, having its root in the strongest passions of the human mind. It exists under different shapes in all governments, more or less stifled, controlled, or repressed; but in those of the popular form it is seen in its greatest rankness, and is truly their worst enemy.

The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension, which, in different ages and countries, has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads, at length, to a more formal and permanent despotism. The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual; and, sooner or later, the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation on the ruins of public liberty.

Without looking forward to an extremity of this kind (which, nevertheless, ought not to be entirely out of sight), the common

and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it.

It serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another; foment occasionally riot and insurrection; it opens the door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passions. Thus the policy and the will of one country are subjected to the policy and will of another.

There is an opinion that parties, in free countries, are useful checks upon the administration of the government, and serve to keep alive the spirit of liberty. This, within certain limits, is probably true; and in governments of a monarchical cast patriotism may look with indulgence, if not with favor, upon the spirit of party. But in those of the popular character, in governments purely elective, it is a spirit not to be encouraged. From their natural tendency it is certain there will always be enough of that spirit for every salutary purpose. And there being constant danger of excess, the effort ought to be, by force of public opinion, to mitigate and assuage it. A fire not to be quenched, it demands a uniform vigilance to prevent its bursting into a flame, lest, instead of warming, it should consume.

It is important, likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding, in the exercise of the powers of one department, to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments, ancient and modern; some of them in our own country and under our own eyes. To preserve them must be as necessary as to institute them. If, in the

opinion of the people, the distribution or modification of the constitutional powers be, in any particular, wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance, in permanent evil, any partial or transient benefit which the use can at any time yield.

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principles.

It is substantially true that virtue or morality is a necessary spring of popular government. The rule indeed extends, with more or less force, to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?

Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.

As a very important source of strength and security, cherish public credit. One method of preserving it is to use it as sparingly as possible; avoiding occasions of expense by cultivating peace, but remembering also that timely disbursements to prepare for danger frequently prevent much greater disbursements to repel it; avoiding, likewise, the accumulation of debt, not

only by shunning occasions of expense, but by vigorous exertions in time of peace to discharge the debts which unavoidable wars may have occasioned; not ungenerously throwing upon posterity the burden which we ourselves ought to bear. The execution of these maxims belongs to your representatives, but it is necessary that public opinion should coöperate. To facilitate to them the performance of their duty, it is essential that you should practically bear in mind that towards the payment of debts there must be revenue; that to have revenue there must be taxes; that no taxes can be devised which are not more or less inconvenient and unpleasant; that the intrinsic embarrassment inseparable from the selection of the proper objects (which is always a choice of difficulties) ought to be a decisive motive for a candid construction of the conduct of the government in making it, and for a spirit of acquiescence in the measures for obtaining revenue, which the public exigencies may at any time dictate.

Observe good faith and justice towards all nations; cultivate peace and harmony with all. Religion and morality enjoin this conduct; and can it be that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and, at no distant period, a great nation, to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence. Who can doubt that, in the course of time and things, the fruits of such a plan would richly repay any temporary advantages which might be lost by a steady adherence to it? Can it be that Providence has not connected the permanent felicity of a nation with its virtue? The experiment at least is recommended by every sentiment which ennobles human nature. Alas! is it rendered impossible by its vices?

In the execution of such a plan, nothing is more essential than that permanent inveterate antipathies against particular nations and passionate attachments for others should be excluded; and that, in place of them, just and amicable feelings towards all should be cultivated. The nation which indulges towards another an habitual hatred or an habitual fondness is, in some degree, a slave. It is a slave to its animosity or to its affection; either of which is sufficient to lead it astray from its duty and its interest. Antipathy in one nation against another disposes each more readily to offer insult and injury, to lay hold of slight causes of umbrage, and to be haughty and intractable

when accidental or trifling occasions of dispute occur. Hence frequent collisions, obstinate, envenomed, and bloody contests. The nation, prompted by ill-will and resentment, sometimes impels to war the government, contrary to the best calculations of policy. The government sometimes participates in the national propensity, and adopts through passion what reason would reject; at other times it makes the animosity of the nation subservient to projects of hostility, instigated by pride, ambition, and other sinister and pernicious motives. The peace often, sometimes perhaps the liberty, of nations has been the victim.

So likewise a passionate attachment of one nation to another produces a variety of evils. Sympathy for the favorite nation, facilitating the illusion of an imaginary common interest, in cases where no real common interest exists, and infusing into one the enmities of the other, betrays the former into a participation in the quarrels and wars of the latter without adequate inducement or justification. It leads also to concessions to the favorite nation of privileges denied to others, which is apt doubly to injure the nations making the concessions; by unnecessarily parting with what ought to have been retained, and by exciting jealousy, ill-will, and a disposition to retaliate in the parties from whom equal privileges are withheld; and it gives to ambitious, corrupted, or deluded citizens (who devote themselves to the favorite nation) facility to betray or sacrifice the interest of their own country without odium; sometimes even with popularity; gilding with the appearance of a virtuous sense of obligation, a commendable deference for public opinion, or a laudable zeal for public good, the base or foolish compliances of ambition, corruption, or infatuation.

As avenues to foreign influence in innumerable ways, such attachments are particularly alarming to the truly enlightened and independent patriot. How many opportunities do they afford to tamper with domestic factions, to practice the art of reduction, to mislead public opinion, to influence or awe the public councils! Such an attachment of a small or weak towards a great and powerful nation dooms the former to be the satellite of the latter.

Against the insidious wiles of foreign influence (I conjure you to believe me, fellow-citizens), the jealousy of a free people ought to be *constantly* awake; since history and experience prove

that foreign influence is one of the most baneful foes of republican government. But that jealousy, to be useful, must be impartial; else it becomes the instrument of the very influence to be avoided, instead of a defense against it. Excessive partiality for one foreign nation and excessive dislike for another cause those whom they actuate to see danger only on one side, and serve to veil, and even second, the arts of influence on the other. Real patriots who may resist the intrigues of the favorite are liable to become suspected and odious, while its tools and dupes usurp the applause and confidence of the people to surrender their interests.

The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations, to have with them as little political connection as possible. So far as we have already formed engagements, let them be fulfilled with perfect good faith. Here let us stop.

Europe has a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns; hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities.

Our detached and distant situation invites and enables us to pursue a different course. If we remain one people, under an efficient government, the period is not far off when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest, guided by justice, shall counsel.

Why forego the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground? Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor, or caprice?

It is our true policy to steer clear of permanent alliances with any portion of the foreign world—so far, I mean, as we are at

liberty to do it; for let me be not misunderstood as capable of patronizing infidelity to existing engagements. I hold the maxim no less applicable to public than to private affairs, that honesty is always the best policy. I repeat it, therefore, let those engagements be observed in their genuine sense; but, in my opinion, it is unnecessary and would be unwise to extend them.

Taking care always to keep ourselves, by suitable establishments, on a respectable defensive posture, we may safely trust to temporary alliances for extraordinary emergencies.

Harmony and a liberal intercourse with all nations are recommended by policy, humanity, and interest. But even our commercial policy should hold an equal and impartial hand; neither seeking nor granting exclusive favors or preferences; consulting the natural course of things; diffusing and diversifying by gentle means the streams of commerce, but forcing nothing; establishing with powers so disposed, in order to give trade a stable course, to define the rights of our merchants, and to enable the Government to support them, conventional rules of intercourse, the best that present circumstances and mutual opinions will permit, but temporary and liable to be from time to time abandoned or varied, as experience and circumstances shall dictate; constantly keeping in view that it is folly in one nation to look for disinterested favors from another; that it must pay, with a portion of its independence, for whatever it may accept under that character; that by such acceptance it may place itself in the condition of having given equivalents for nominal favors, and yet of being reproached with ingratitude for not giving more. There can be no greater error than to expect or calculate upon real favors from nation to nation; it is an illusion which experience must cure, which a just pride ought to discard.

In offering to you, my countrymen, these counsels of an old and affectionate friend, I dare not hope they will make the strong and lasting impression I could wish; that they will control the usual current of the passions, or prevent our nation from running the course which has hitherto marked the destiny of nations; but if I may even flatter myself that they may be productive of some partial benefit, some occasional good; that they may now and then recur to moderate the fury of party spirit, to warn against the mischief of foreign intrigues, to guard against the im-

postures of pretended patriotism, this hope will be a full recompense for the solicitude for your welfare by which they have been dictated.

How far, in the discharge of my official duties, I have been guided by the principles which have been delineated, the public records and other evidences of my conduct must witness to you and the world. To myself the assurance of my own conscience is, that I have at least believed myself to be guided by them.

In relation to the still subsisting war in Europe, my proclamation of the 22d of April, 1793, is the index to my plan. Sanctioned by your approving voice and by that of your representatives in both Houses of Congress, the spirit of that measure has continually governed me, uninfluenced by any attempts to deter or divert me from it.

After deliberate examination, with the aid of the best lights I could obtain, I was well satisfied that our country, under all the circumstances of the case, had a right to take, and was bound in duty and interest to take, a neutral position. Having taken it, I determined, as far as should depend upon me, to maintain it with moderation, perseverance, and firmness.

The considerations which respect the right to hold this conduct it is not necessary on this occasion to detail. I will only observe that, according to my understanding of the matter, that right, so far from being denied by any of the belligerent powers, has been virtually admitted by all.

The duty of holding a neutral conduct may be inferred, without anything more, from the obligation which justice and humanity impose on every nation, in cases in which it is free to act, to maintain inviolate the relations of peace and amity towards other nations.

The inducements of interest for observing that conduct will best be referred to your own reflections and experience. With me a predominant motive has been to endeavor to gain time to our country to settle and mature its yet recent institutions, and to progress without interruption to that degree of strength which is necessary to give it, humanly speaking, the command of its own fortunes.

Though, in reviewing the incidents of my administration, I am unconscious of intentional error, I am nevertheless too sensible of my defects not to think it probable that I may have com-

mitted many errors. Whatever they may be, I fervently beseech the Almighty to avert or mitigate the evils to which they may tend. I shall also carry with me the hope that my country will never cease to view them with indulgence; and that, after forty-five years of my life dedicated to its services with an upright zeal, the faults of incompetent abilities will be consigned to oblivion, as myself must soon be to the mansions of rest.

Relying on its kindness in this, as in other things, and actuated by that fervent love towards it which is so natural to a man who views in it the native soil of himself and his progenitors for several generations, I anticipate, with pleasing expectation, that retreat in which I promise myself to realize without alloy the sweet enjoyment of partaking, in the midst of my fellow-citizens, the benign influence of good laws under a free Government—the ever favorite object of my heart—and the happy reward, as I trust, of our mutual cares, labors, and dangers.

¶

GEORGE WASHINGTON.

United States, 17th September, 1796.

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